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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,
KEITH A. JONES,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–17a), is not yet reported. The opinion of the district court (App. C, *infra*, pp. 20a–38a) is reported at 361 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 18a–19a) was entered on September 4, 1974. On December 2, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to

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and including December 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subcontractor who fraudulently causes its prime contractor to submit multiple false claims for payment to the United States in connection with a government contract is liable for multiple forfeitures under the False Claims Act.

2. Whether recoveries from the prime contractor for breach of contract reduce "the amount of damages the United States may have sustained by reason of the * * * [subcontractor's fraudulent] act[s]" for purpose of the Act's double-damages provision.

STATUTE INVOLVED

The False Claims Act, 12 Stat. 698, 31 U.S.C. 231, in pertinent part provides:

> Any person * * * [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *.

STATEMENT

This case arises out of a government contract for the procurement of radio kit sets for the Department of the Army. Under the contract the prime contractor, Model Engineering and Manufacturing Corp., Inc. ("Model"), agreed to equip each of the kits with a specified type of electron tube bearing special markings to indicate that it had passed government inspection (App. C, *infra*, p. 21a, n. 2). Model entered into a subcontract with United National Labs ("United"), a corporation operated and managed by respondents, for the purchase of the necessary tubes.

Respondents, acting through United, knowingly furnished Model with falsely branded tubes that had not in fact been inspected by the government (App. C, *infra*, p. 24a). Model incorporated the tubes into radio kits and shipped the kits to the Department of the Army in 35 lots, each of which was covered by a separate claim for payment (App. C, *infra*, p. 26a). The Army paid Model with eight vouchers (*ibid.*).

The tubes were subsequently discovered to have been falsely branded, and the government expended $16,-

205.54 to replace them with tubes that conformed with the contract specifications (App. C, *infra*, p. 30a).[1] Model paid the government $16,165.84 in settlement of a contract claim based upon that expenditure (App. C, *infra*, pp. 27a-35a).[2]

The United States then brought this suit against respondents under the False Claims Act, requesting multiple $2,000 forfeitures and double damages. The district court found that respondents, "[b]y knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, * * * caused Model to present thirty-five claims for payment to the United States" (App. C, *infra*, p. 28a). The court determined that each of the 35 false claims for payment constituted a separate and complete violation of the Act and therefore that the United States was entitled to 35 forfeitures in the total amount of $70,000. However, the court reasoned that Model's payment had reduced the government's single damages to $39.70 for purposes of the Act, and therefore awarded double damages of only $79.40.

Respondents and the goverment both appealed. The court of appeals affirmed the award of only nominal double damages but reversed the award of multiple

[1] The shipments from Model contained a total of 442 falsely branded tubes, which the government replaced at a cost of $40.82 per tube. The district court found, however, that "[o]nly 397 of these tubes can be identified by serial number as having been supplied by [respondents]" (App. C, *infra*, p. 25a).

[2] Model paid the government $40.72 for each of the nonconforming tubes supplied pursuant to the contract (App. C, *infra*, p. 35a).

forfeitures. The court acknowledged that the literal language of the Act justifies the multiple forfeitures awarded by the district court and that in like circumstances multiple forfeitures were permitted by the Sixth Circuit in *United States* v. *Ueber*, 299 F. 2d 310.

The court nevertheless determined that the number of forfeitures should not be based upon the "fortuity" of the number of claims for payment actually submitted by the prime contractor. It therefore ruled that, in cases involving fraud by subcontractors, the number of forfeitures under the Act should be determined by reference to the number of subcontracts whose performance was affected by the subcontractor's fraud, and not by reference to the actual number of false claims submitted to the United States. Accordingly, the court reversed as to all but one of the forfeitures. The court concluded its opinion by noting that its decision conflicted with *Ueber* and observing (App. A, *infra*, p. 17a):

> Perhaps the Supreme Court will shed more light than we have been able to do. Any limiting interpretation of [the False Claims Act] involves arbitrary line drawing. This statute, we may add, cries out for congressional attention.

REASONS FOR GRANTING THE WRIT

The court of appeals' disallowance of multiple forfeitures directly conflicts with the decision of the Sixth Circuit in *United States* v. *Ueber*, *supra*, and appears to be inconsistent with this Court's construction of the False Claims Act in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537. The decision below also

substantially impairs the effectiveness of the Act in deterring fraud by government subcontractors.

1. It is undisputed that the False Claims Act applies to false claims caused to be presented to the United States by government subcontractors. See, *e.g.*, *United States ex rel. Marcus* v. *Hess, supra; United States* v. *Rohleder,* 157 F. 2d 126 (C.A. 3). It also has been long established that, in cases of fraud by prime contractors, the number of forfeitures under the Act is determined by reference to the number of separate violations committed, not by reference to the number of contracts with respect to which false claims were made. See *United States* v. *National Wholesalers,* 236 F. 2d 944 (C.A. 9) (eight forfeitures arising from a single contract); *Faulk* v. *United States,* 198 F. 2d 169 (C.A. 5) (five forfeitures arising from one contract).

Reasoning from these decisions, the Sixth Circuit in *Ueber* correctly concluded that a subcontractor also is responsible for multiple forfeitures when its fraudulent misrepresentations result in the presentation by the prime contractor of multiple false claims to the United States. The court below refused to follow *Ueber* and rejected the logic of the earlier courts of appeals' decisions as well.

There is no basis in the statutory text for the court's disallowance of multiple forfeitures for a subcontractor's fraud. As this Court observed in the course of upholding 56 forfeitures in *United States ex rel. Marcus* v. *Hess, supra,* 317 U.S. at 552, the Act "requires that the $2,000 forfeit be paid for doing 'any' of the [prohibited] acts * * *." See, also, *Toepleman* v. *United States,* 263 F. 2d 697 (C.A. 4). In short,

each separate and complete violation of the Act "justif[ies] an assessment of a separate forfeiture." *United States* v. *Ueber, supra,* 299 F. 2d at 313. Each false claim that respondents caused Model to make represents a separate violation of the Act and therefore forms the basis for a separate $2,000 forfeiture.

Nor is the decision below supported by the underlying policies of the Act. As this Court has more than once noted, "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the government from fraudulent claims * * *'." *United States* v. *Neifert-White Co.,* 390 U.S. 228, 233. The decision below substantially defeats that objective by converting the forfeitures provision of the Act into little more than a $2,000 license for subcontractor fraud.

Although, as the court observed, respondents here could not control the number of false claims submitted by Model, they could reasonably have assumed that the radio kits would be shipped in separate lots and that multiple claims for payment would therefore be required. Thus the assessment of multiple forfeitures in such cases would involve no unfair surprise, and it would significantly enhance the deterrent effect of the Act.

2. The court's further holding that recoveries from Model for breach of contract reduce the "amount of damages which the United States may have sustained by reason of * * * [respondents' fraudulent] act[s]," within the meaning of the Act's double-damages provision, additionally weakens the Act's power to deter subcontractor fraud. Although there is no conflict yet

among the courts of appeals on this issue, it is a significant question under the Act that may be appropriately and conveniently considered together with the question of multiple forfeitures.

The court below erroneously read the Act's double-damages provision as if it permitted doubling only of the "amount of *uncompensated* damages which the United States may have sustained * * *." We see no basis in the language of the Act or its underlying policies for that reading.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The normal first recourse in such cases is a claim against the prime contractor for ordinary contract damages; typically, as in this case, the contractor will have no valid defense to such a claim. Thus, where the contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have recovered the losses occasioned by the fraud. We do not believe it appropriate to insulate the subcontractor, as the court below has done, from virtually any liability for the payment of statutory damages to the government in such circumstances merely because of the government's diligence in pursuing its contract remedies.

We believe the appropriate result in such circumstances to be an assessment against the subcontractor of double the amount of the government's pre-recovery damages, followed by the equitable allowance of a credit against the doubled damages in the amount

of the government's recoveries from the prime contractor. That result would preserve the deterrent effect of the double-damages provision while at the same time both preventing a government windfall and protecting the subcontractor (which presumably will be liable to the prime contractor for the amount of the latter's payment to the government) against liability (other than for forfeitures) in excess of double damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.
DECEMBER 1974.

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APPENDIX A

United States Court of Appeals For The Third Circuit

Nos. 73–1885/1886/1887

UNITED STATES OF AMERICA

v.

PHILIP L. BORNSTEIN, GERALD PAGE AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTROMATICS, INC.

PHILIP L. BORNSTEIN, APPELLANT IN No. 73–1885
UNITED STATES OF AMERICA, APPELLANT IN No. 73–1886
GERALD PAGE, APPELLANT IN No. 73–1887

On Appeal from the United States District Court for the District of New Jersey

Argued May 17, 1974 before SEITZ, *Chief Judge*, VAN DUSEN and GIBBONS, *Circuit Judges*

GIBBONS, C. J.

Appeals by the defendants and an appeal by the plaintiff United States of America bring before us for interpretation the False Claims Act. Act of March 2, 1863, Ch. 67, 12 Stat. 696, 698, 31 U.S.C. § 231. The United States on November 3, 1967 brought an action for double damages and forfeitures against defendants Philip L. Bornstein, Gerald Page, individuals, and United National Labs, Division of Sonora Electromatics, Inc., a New Jersey corporation. Bornstein and Page were officers and owners of that corporation, which by order of July 19, 1973 was dismissed as a

defendant. The individual defendants are referred to hereafter as "United." The case was tried to the district court on a stipulation of facts. On June 26, 1973 the district court filed an opinion[1] determining that judgment should be entered in favor of the United States and against United for double damages, in the sum of $79.40, and forfeitures in the sum of $70,000. A judgment was entered for $70,079.40 and costs. United appeals from the judgment awarding $70,000 in forfeitures. The United States appeals from the award of $79.40 in double damages.

I. THE FRAUDULENT SCHEME

In August 1962 the United States Signal Supply Agency entered into a supply contract with Model Engineering and Manufacturing Corporation, Inc. (Model) under which Model was to supply radio kit sets to the Army. Each radio kit was to contain two electron tubes designated "JAN type 4X150G per MIL E–1 specifications." "JAN" stands for Joint Army Navy qualification approval standard. Tubes may be "JAN" branded by the manufacturer only after they have passed government inspection at the place of manufacture during the manufacturing process. As proof of such source inspection the government inspector imprints his "Eagle" acceptance stamp on packing lists accompanying each shipment of tubes. He also affixes his signature to a written certification that the tubes have passed all the required tests, in this case those specified in MIL E–1. During the relevant time only authorized manufacturer of JAN type 4 x 150G tubes was Eitel McCullough, Inc. (Eimac). Although JAN type 4X150G tubes are manufactured to military specifications, surplus or obsolete tubes of that model are commercially

[1] *United States* v. *Bornstein*, 361 F. Supp. 869 (1973).

useable. On April 30, 1963 Arthur H. Richardson, Inc. (Richardson) a franchised distributor for Eimac, purchased 451 tubes, type 4X150G, from Eimac which had been placed in a termination inventory because of a design change, for $15.52 a tube. In May 1963 United wrote to Model that it could supply JAN type 4X150G tubes for $32.00 per tube. The market price for such tubes from Eitel's production was then $40.00. In July United purchased ten JAN type 4X150G tubes from Richardson and shipped them to Eitel for preliminary inspection. Model advised United respecting the ten sample tubes that they were electrically and physically acceptable, but had no code date and no JAN marking. In December 1963, Model issued to United a purchase order for 1008 JAN type 4X150G tubes at $32.00 a tube. United made an initial delivery of 120 tubes, which Model returned as unacceptable because they were not JAN labeled and had not been government source inspected. United assured Model it could deliver JAN tubes to fill the purchase order. It purchased 380 JAN type 4X150G tubes from Richardson for $17.50 each, and affixed on each tube the JAN designation, the manufacturer's qualification code, and the acceptance date. United then shipped each tube to Saxon Laboratories, Inc. (Saxon) for testing. At Saxon's plant the impression of a facsimile government inspector's "Eagle" stamp was affixed to twenty-one separate packing lists identifying each tube by serial number. The twenty-one packing lists covered twenty-one boxes, which included a total of 397 tubes. The stipulation does not disclose the source of the seven tubes in addition to the 390 acquired from Richardson. The twenty-one boxes were shipped to Model in three shipments. With each shipment United issued to Model a

"Certificate of Compliance" certifying that the parts complied with the specifications referred to in the purchase order. Model included the 397 tubes in its shipments to the Signal Supply Agency, and filed with the United States thirty-five invoices covering the entire contract price. The United States paid the thirty-five invoices.

Later the government learned that some 442 of the JAN type 4X150G tubes shipped by Model were falsely branded JAN. It replaced these tubes with JAN type 4X150G tubes which it purchased for $40.82 each or a total of $18,042.44. It then made a claim against Model. In November 1964 Model paid the United States $18,000 on account of the 442 falsely branded tubes. The government was able to trace 397 of the 442 tubes by serial number to United. The government retained the 397 tubes which have a commercial value not clearly established by the stipulation. The stipulation reflects no costs to the government other than $40.82 paid to replace the misbranded tubes.

II. THE DISTRICT COURT DECISION

The district court calculated the government's damages by multiplying the $40.82 replacement cost by 397, for a total of $16,205.54, and by deducting from that amount $16,165.84. The latter figure was calculated by dividing the $18,000 refund from Model by 442, the total number of falsely labeled tubes, or $40.72 a tube and multiplying $40.72 by 397. Thus the district court calculated the government's damage at ten cents a tube ($40.82–$40.72) or $39.70, and doubled that figure to $79.40.

The district court calculated the statutory forfeiture on the basis of a single $2,000 forfeiture for each of the 35 invoices submitted by Model to the United States for payment.

III. THE GOVERNMENT'S APPEAL

The government contends on appeal that the district court erred in calculating damages. It contends that the damage award should have been $32,411.08, which it calculates: 397 x $40.82=$16,205.54 and $16,205.54 x 2=$32,411.08. Since it is the plaintiff it had the burden of proving damages. Its claim is, in the words of the statute, for "double the amount of damages which the United States may have sustained by reason of the doing or committing such act." 31 U.S.C. § 231. Nowhere in its brief does it demonstrate the relationship between the figure of $16,205.54 and the amount of damages which it sustained. Rather it makes the disingenuous contention that the $18,000 refund by Model should be entirely omitted from the calculation of damages on the authority of the collateral source rule. This despite the fact that it stipulated:

> "In November, 1964, Model paid the United States $18,000 for the Government's claim relating to the payments of the 442 falsely branded JAN 4X150G tubes which are referred to in the Complaint. Appellants' [Bornstein and Page] Appendix at 16a.

To avoid the effect of its stipulation that it was refunded $40.72 for every tube, it asserts that the $18,000 payment should be disregarded entirely because it took the form of a setoff against funds due to Model on other contracts. The government's answers to interrogatories included in the stipulation, paragraph 25, establish that this form of payment resulted because Model was experiencing a shortage of working capital. In accepting Model's offer of an $18,000 setoff the Assistant Attorney General wrote:

> "Our claim against Model arose through the failure of that company to furnish electron tube type 4X150G to the Government in accordance

> with the specifications set forth in Contract No. DA-36-039-AMC-01080 (E) dated August 29, 1962, awarded by the United States Army Signal Supply Agency, Philadelphia, Pennsylvania. The *damages* were computed to total $18,042.44 based on the receipt by the Department of the Army of 442 non-conforming and surplus tubes." (emphasis added) Appellant's [Government] Appendix at A-5.

By some reasoning process which escapes us the government concludes that the *damages* referred to in the letter are different from the *damages* caused by United's false claim, even though in both instances they refer to 397 of the same tubes and to a replacement cost of $40.82 per tube. By similar logic the government could recover damages of $40.82 a tube from United had it never paid the Model invoices in the first place.

We do not suggest that in a claim for double damages under the False Claims Act the government's recovery is limited to the replacement cost of non-conforming materials. Nor need we decide in this case whether the ordinary contract rules of damages apply. The point is that the government was the plaintiff and had the burden of proving damages. It proved by stipulation no other element of damage to it than the $40.82 replacement cost of the tubes, for $40.72 of which it had been reimbursed by Model. Its proof of damages established no greater loss than 10 cents a tube. Nor do we suggest that had the claim against Model been for forfeitures under the False Claims Act the recovery of such forfeitures should be applied in reduction of the claim for damages against United. There is no suggestion in the stipulation that any claim for forfeitures was asserted against Model, or that the government even sought double rather than single damages from that source. In the record before

us the government stipulated that the Model payment was for damages simpliciter. We cannot at the appellate level disregard the record which the plaintiff made in the district court.

Alternatively the government contends that if the Model payment should be credited in reduction of its damage claim the credit should not have been applied to the single damage amount but to that amount doubled. In *United States* v. *Klein,* 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd per curiam,* 356 F.2d 983 (3d Cir. 1966), the Veterans Administration was falsely induced to make insured loans. Certain amounts were received by the Veterans Administration after foreclosure of the properties in reduction of the loans. The district court applied these credits before doubling damages. We affirmed without opinion. The district court in the instant case followed *Klein.* The government relies on *United States* v. *Sytch,* 257 F.2d 475, 478–79 (3d Cir. 1958), in which the defendants fraudulently overstated costs and obtained overpayments from the Veterans Administration for operating a school in the years 1948–50. A counterclaim was filed for an amount due under a separate contract for 1951. This amount was conceded by the government. It was applied as a credit after damages for false claims under the 1948–50 contracts were doubled. The distinction is obvious. A credit on an unrelated second contract may be applied in reduction of the defendants' total indebtedness, but it has no relation to the amount of damages due on the first claim. Payments made in reduction of the loss on the first claim, however, are an essential part of the proof of the amount of damages. The determination of the amount of damage must be made before it is doubled. In the instant case the claim against Model was for the same loss as is asserted against

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United. The district court correctly followed *Klein* rather than *Sytch*. The only actual damage proved by the government was ten cents a tube.

One other aspect of the damage equation which the district court did not take into account was the actual value of the nonconforming tubes. These are still in the government's possession, and have a commercial market value, according to the stipulation, of between $15.00 and $17.50 a tube. United urged the district court that this value must be taken into account. United did not, however, appeal from that part of the judgment awarding the government $79.40 in damages. If we had accepted either of the government's contentions as to the calculation of damages the amount of any credit for the commercial market value of 397 tubes would be a significant issue. We do not reach it because United does not contest the $79.40 award.

IV. UNITED'S APPEAL

United contends that the district court erred in assessing 35 forfeitures of $2,000 based on the fact that Model had presented 35 invoices to the United States. Each of these invoices included claims for payment of JAN type 4X150G tubes misbranded JAN by United. It did not, however, prepare the invoices or have any knowledge of the manner in which Model's claims for payment were presented. It knew, of course, that Model would seek payment from the United States. United urges that there should be (1) a single forfeiture because the tubes were supplied under a single government contract, or because it furnished the tubes under a single purchase order, or (2) three forfeitures, because it made only three shipments, issued only three invoices, and received only three payments from Model, or (3) eight forfeitures because the government made only eight payments, or (4) at most twenty-one forfeitures because only 21 fraudulently stamped packing lists and 21 false certificates of compliance were prepared. It argues that the number of invoices made out by Model was entirely fortuitous and unrelated to any activity by it. In the district court the government asserted at one time 38 forfeitures: one for each of the 35 Model invoices, one for the false branding of 397 tubes, one for affixing the facsimile "Eagle" stamp on 21 packing lists and one for the issuance of 21 false Certificates of Compliance. At an earlier time it asserted 30 forfeitures in the mistaken belief that there were 30 invoices from United to Model rather than three. On appeal the government is satisfied with 35 forfeitures.

United does not contend that the Act is inapplicable to a subcontractor who did not deal directly with the government. Such a contention is foreclosed by *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) and *United States* v. *Rohleder*, 157 F. 2d 126 (3d Cir. 1946). Rather, it contends that the number of forfeitures must somehow be related to the incidence of fraud by it, rather than left to the fortuity that the prime contractor submitted thirty-five invoices rather than one.

The text of the statute gives little guidance. The text set forth at 31 U.S.C. § 231 is not an enacted codification. The original version appeared in Act of March 2, 1863, Ch. 67, 12 Stat. 696. Section 1 of that Act subjected military personnel to courtsmartial for presenting a false claim, and § 3 subjected persons not in the military to double damages and a $2,000 forfeiture. The double damage feature undoubtedly was included because § 3 of the Act provided for qui tam actions in which the private informant pursuing the claim on behalf of the United States received one

half of the recovery. *See United States ex rel. Marcus v. Hess, supra*; *Toepleman v. United States*, 263 F. 2d 697 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959). In the Revised Statutes, which were enacted into positive law, the 1863 Act was replaced by § 5438, which subjected a person not in the military to a fine and imprisonment for presenting a false claim, § 3490, which subjected a person not in the military to double damages and a $2,000 forfeiture for committing an act prohibited by § 5438 and § 3493 which reenacted the qui tam provision of § 6 verbatim. Thus in the Revised Statutes the acts for which forfeitures under § 3490 could be imposed were those set forth in the criminal provisions of § 5438. The criminal provisions of § 5438 were amended by the Act of May 30, 1908, Ch. 255, 35 Stat. 555, and codified and reenacted as section 35 of the Criminal Code in Act of March 4, 1909, Ch. 321, § 35, 35 Stat. 1095–96. Section 35 of the Criminal Code was amended by the Act of Oct. 23, 1918, Ch. 194, 40 Stat. 1015–16, by Act of June 18, 1934, Ch. 587, 48 Stat. 996, and by the Act of April 4, 1938, Ch. 69, 52 Stat. 197. In the 1948 recodification of the Criminal Code § 35 was split into two sections, 18 U.S.C. § 287 (false claims) and 18 U.S.C. § 1001 (false statements) and reenacted into positive law. Sections 287 and 1001 of Title 18 remain today as recodified in 1948. The civil damage and forfeiture provisions of § 3490 of the Revised Statutes have remained unaltered since the enactment of that revision. The operative law today is § 3490 which reads:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with costs of suit; and such forfeiture and damages shall be sued for in the same suit." R.S. § 3490 (1878).

One might have thought that from the successive amendments of the criminal provision referred to the courts might have perceived a Congressional intention that the liability for forfeitures under § 3490 continue to be defined by those amendments. The Supreme Court has indicated otherwise, however. *See United States v. Neifert-White Co.*, 390 U.S. 228, 228 n.1 (1968); *Rainwater v. United States*, 356 U.S. 590, 590 n.1, 592 (1958). The acts for which forfeitures may be imposed under § 3490 are those which were prohibited by § 5438 of the Revised Statutes which as here relevant reads:

> "Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval . . . knowing such claim to be false . . . or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the government of the United States . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall be imprisoned at hard labor. . . ."

The statute defines additional offenses with respect to federal property not here relevant.[2] Three separate offenses possibly relevant to the instant case are set forth. These may be paraphrased as [1] making a false claim on the government either directly or through an agent, [2] making a false entry for the purpose of aiding in having the false claim paid, and [3] entering into a combination or conspiracy to obtain the allowance of any false claim.

The Supreme Court has addressed the issue of multiple forfeitures only once, and on that occasion not definitively. In *United States ex rel. Marcus* v. *Hess, supra*, the defendants' chief attacks on the forfeiture judgment were that it violated the double jeopardy clause of the fifth amendment and that the qui tam

[2] "Every person who . . having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor . . . ." R.S. § 5438.

provisions of R.S. § 3493 since repealed[3] were unlawful. The informer, Marcus, and the Attorney General were the petitioners for certiorari. After concluding that the judgment of this court, which had reversed the district court judgment imposing forfeitures, should be reversed, Justice Black wrote:

> "Section 3490 requires that the $2,000 forfeit be paid for doing 'any' of the acts prohibited by § 5438. Before the District Court, petitioner contended that this sum should be exacted for every form submitted by respondents in the course of their enterprise, while respondents argued that there should be merely one $2,000 sum collected for all the acts done. The District Court concluded that the lump sum in damages should be assessed for each separate P.W.A. project. Petitioner does not object to this decision and we conclude that under the circumstances of this case each project can properly be counted separately. The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office [citations omitted]. . . ." 317 U.S. at 552.

The context of the quoted language was a case in which the fraud was a collusive bid rigging conspiracy in the Pittsburgh area which operated with respect to 56 contracts with local government units financed by the Federal Public Works Administration. The district court had assessed fifty-six $2,000 penalties, which Justice Black refers to as "the lump sum" in damages. 317 U.S. at 552. The informer had contended in the district court that each false affidavit or certificate that was submitted to the P.W.A. administrator would be grounds for a separate $2,000 forfeiture. The defendants had contended that since there was a single ongoing conspiracy, only one forfeiture

[3] Act of Dec. 23, 1943, Ch. 377, § 2, 57 Stat. 609.

Hess, supra, rejected the government's contention, writing:

> "The government argues that in Hess the fraud was in the procurement of the contracts whereas in the situation confronting us the fraud arises from the means taken to obtain the approval of the Supervisor of Shipbuilding. That difference does exist but is not enough to avoid the impact of the Hess opinion. There the Supreme Court said 317 U.S. at page 552, 63 S.Ct. at page 388, 87 L.Ed. 443: 'The incidence of fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office.' Nor do we think that it can be fairly substantiated that the District Court in limiting the forfeiture to the sixteen contracts overlooked the second and third clauses of Section 6438. The fraud was committed with respect to the contracts. The purchase orders were part of those contracts and not definite projects in themselves. They are analogous to the great number of spurious forms in the Hess case which were absorbed into their respective projects. The grouping by the Trial Judge of the ninety purchase orders under their respective contracts generally corresponds to the distinctions made in United States ex rel. Marcus v. Hess, supra. It is reasonable and has a sound basis in the record." 157 F. 2d at 131.

United takes comfort from the *Hess* and *Rohleder* cases, suggesting that *Hess* would permit only one forfeiture since there was only one government project, and that *Rohleder* would permit only one forfeiture since there was only one purchase order from Model to United.

The district court did not choose to follow United's interpretation of *Hess* and *Rohleder*. Instead it followed *United States* v. *Ueber*, 299 F. 2d 310 (6th Cir. 1962). In that case a subcontractor submitted 442

was permitted. The district court had concluded that a bid rigging conspiracy prohibited by the third clause of § 5438 had affected 56 government-financed contracts. *See United States ex rel. Marcus* v. *Hess,* 41 F. Supp. 197, 216 (W.D.Pa. 1941). Since the petitioners for certiorari had before reaching the Supreme Court abandoned the contention that there could be a separate forfeiture for each false entry (the second clause of § 5438) the Court's holding deals only with the propriety of assessing a forfeiture under the conspiracy clause for each contract affected by a bid rigging conspiracy. Justice Black might have found a violation or violations of the third (conspiracy) clause of § 5438. Instead, possibly with the intention of narrowing the construction of § 3490, he said that the first clause governed. 317 U.S. at 540, n.2.

Three years after the *Hess* decision an issue of the appropriate number of forfeitures was before this court in *United States* v. *Rohleder,* 157 F.2d 126 (3d Cir. 1946). In that case Cramp Shipbuilding Company had a contract with the Navy to erect emergency plant facilities. Cramp had authority to subcontract subject to approval in advance by the Navy's Supervisor of Shipbuilding of all plans, prices, subcontractors and subcontracts. As work was completed Cramp would present a Final Cost Certificate and would be reimbursed monthly. Cramp entered into sixteen subcontracts with Rohleder on a cost-plus-fixed-fee basis. The Navy required that for approval of purchase of materials three or more vendors bids and prices be submitted. In ninety instances Rohleder submitted two fictitious bids along with that of the actual single vendor. The district court assessed sixteen penalties. On its cross-appeal the government contended that there should have been ninety forfeitures. This court, purporting to follow *United States ex rel. Marcus* v.

false invoices to the main subcontractor who in turn submitted 54 invoices to the United States. The court approved the imposition of 54 forfeitures based on those 54 invoices. Arguably the *Ueber* court was quite correct in determining that 54 forfeitures were permitted.[4] The violation was that set forth in the first clause of § 5438. The defendant subcontractor had knowingly caused to be made and presented for payment by the contractor a false claim. *Ueber* is not inconsistent with *Hess* for the holding in *Hess* did not depend upon the first clause of § 5438, but rather by the third clause. It must be noted that each of these clauses defines a separate crime involving different elements.

Ueber, and the district court decision in this case, however, is inconsistent with the language quoted above from *Rohleder*. *Rohleder* was not a conspiracy. It was, like the *Ueber* case, an instance of a subcontractor causing a contractor to submit a false claim. However, this court in *Rohleder* perceived in *Hess* an intention to give § 3490 a narrow and reasonable construction. If literally applied the section would permit a separate $2000 forfeiture under clause [1] of § 5438 for each invoice submitted by the main contractor (in this case 35); a separate $2000 forfeiture under clause [2] of § 5438 for each false entry (in this case 439); and a separate forfeiture under clause [3] of § 5438 for each conspiracy (in this case at least one). We may well question whether as so construed the statute would not compel the conclusion that it was penal rather than civil. That, of course, was the chief ground for appeal asserted in the *Hess* case, and

[4] *See also* United States v. National Wholesalers, 236 F. 2d 944 (9th Cir. 1956) (8 vouchers, 8 forfeitures), *cert. denied*, 353 U.S. 930 (1957); Faulk v. United States, 198 F. 2d 169 (5th Cir. 1952) (5 vouchers, 5 forfeitures).

probably was the reason for Justice Black's narrowing construction. This being so we continue to adhere to the interpretation of § 3490 announced in *Rohleder*. That interpretation focuses upon conduct of the defendants rather than upon the fortuity of the number of invoices submitted by the main contractor. Consistent with *Rohleder* there should under the first clause of § 5438 have been a single forfeiture since the defendants' fraud affected the performance of a single purchase order from Model to Union.

We note that there is a possible overlap between the offenses defined in the first and second clauses of § 5438 in that the means taken by a subcontractor to cause a contractor to make a false claim may, as was the case here, involve making false entries. But just as in *United States ex rel. Marcus* v. *Hess*, *supra*, the petitioners before the Supreme Court abandoned any contention for forfeitures in excess of 56, the government here has not pressed for more than 35 forfeitures. Thus we need not in this case consider whether on a single transaction a separate § 3490 forfeiture may be imposed by virtue of a violation of the first and the second clauses of § 5438.

We recognize that by our continued adherence to *Rohleder* we have continued a conflict in our interpretation of § 3490 and that of the Sixth Circuit in *Ueber*. Perhaps the Supreme Court will shed more light than we have been able to. Any limiting interpretation of § 3490 involves arbitrary line drawing. This statute, we may add, cries out for congressional attention.

The judgment will be affirmed with respect to double damages in the amount of $79.40 and with respect to the award of a single forfeiture in the amount of $2,000. The judgment awarding forfeitures in excess of $2,000 will be vacated.

APPENDIX B

United States Court of Appeals for the Third Circuit

Nos. 73-1885/73-1887

UNITED STATES OF AMERICA

v.

PHILIP L. BORNSTEIN, GERALD PAGE AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTRONICS, INC.

PHILIP L. BORNSTEIN, APPELLANT IN No. 73-1885
UNITED STATES OF AMERICA, APPELLANT IN No. 73-1886
GERALD PAGE, APPELLANT IN No. 73-1887

[D.C. Civil Action No. 1141-67]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN and GIBBON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 12, 1973, be, and the same is hereby affirmed with respect to double

damages in the amount of $79.40 and the award of a single forfeiture in the amount of $2,000.00. The judgment of the District Court awarding forfeitures in excess of $2,000.00 will be vacated.

Attest:

Clerk.

SEPTEMBER 4, 1974.

APPENDIX C

United States District Court District of New Jersey

Civil Action No. 1141–67

OPINION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

PHILIP L. BORNSTEIN, GERALD PAGE, AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTRONICS, INC., DEFENDANTS.

KITCHEN: DJ:

The United States brings this civil action pursuant to the provisions of the False Claims Act (Act), 31 U.S.C.A. § 231, *et seq.*, to recover forfeitures and double damages provided for in section 231. Jurisdiction is founded in 31 U.S.C.A. § 232. The matter is before this Court on a stipulation of facts, trial memoranda of law, and oral argument of counsel. Findings of the Court are based on that stipulation.

Defendant United National Labs (United), a corporation of the State of New Jersey, was engaged in the business of purchase and sale of electron tubes. Defendant Bornstein was part owner and general manager of United; defendant Page was part owner, vice-president, and manager of sales of that corporation. At all times relevant to this proceeding United was operated and managed by Bornstein and Page.

In August 1962 the United States Signal Supply Agency entered into Supply Contract No. DA–36–039–AMC–01080(E) with Model Engineering and Manu-

facturing Corp., Inc. (Model), a corporation of the State of Indiana. Model was engaged in manufacturing and building electronic radio equipment and radio sets, and under the contract was to supply radio kit sets [1] to the Department of the Army. The component parts list of this contract specified that Sub-item #1–5–33, to be included in the radio accessory kits, called for:

2 ea. Tube, Electron JAN type
4X150G Per Specifications, MIL.
E–1 and TSS MIL. E–1, 302E
dated 4/17/57 [2]

[1] Each radio kit set was to contain the following: Radio transmitter kit; radio receiver kit; power supply kit; radio transformer kit; and a radio accessory kit. The total dollar volume of the contract was $2,096,583.08.

[2] The specifications regarding this particular JAN type tube provided as follows:

3.7.1.1 "JAN" prefix. The designation of all tubes procured under this specification shall bear the prefix "JAN" except that in the case of small tubes (T-6½ bulb outline or smaller) the prefix "J" shall be used. Tubes procured under a contract which either permits or requires any changes in any of the conditions or requirements of this specification shall not bear the prefix "JAN" nor any abbreviation thereof. The "JAN" brand is registered under number 504860 by the United States Patent Office and shall be used only on tubes which have passed Government inspection.

3.7.1.2 Qualification code. The qualification code marking follows the "JAN" prefix. This designation is assigned to the manufacturer for use on all tube types of his manufacture which has passed the qualification tests and have been approved for inclusion on the Qualified Products List. The code-designating letters shall be as listed in Publication NAVSHIPS 900,152. The code-designation shall be used only by the manufacturer to whom it has been assigned and only as a part of the designation on tubes manufactured at the plant to which the qualification approval was granted. In the case of small tubes (see 3.7.1.1), the manufacturer's code designation may be abbreviated by deleting "C" (the indication that the code has been

Continued

JAN 4X150G electron tubes are manufactured only for use in military equipment. Surplus or obsolete JAN 4X150 G tubes may be used commercially even though they were originally manufactured for military use. During all times relevant to this proceeding the only authorized manufacturer of JAN 4X150G tubes was Eitel McCullough, Inc. (Eimac), a corporation of the State of California.[3] Eimac's qualification code,[4] which appeared on all tubes of its origin that had passed certain qualification tests, was CIM. In addition to the branding of JAN–CIM on tubes that passed all of the tests, Eimac imprinted an acceptance code date on each tube. This code date was a four digit number reflecting the year and week of manufacture.

Due to the requirements of the equipment specifications and "JAN" tests the use of non-"JAN" branded commercial tube or a surplus or obsolete "JAN" branded tube required prior written approval from the Government contracting officer who admin-

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Continued
assigned to a commercial organization in the United States or Canada).

3.7.1.2.1. Tubes not having qualification. Tubes procured under this specification from a source of supply for which no qualification approval has been granted, shall be marked "JAN" followed by the type on the side wall of the base, or on the envelope of metal, loc-in tubes, or other glass tubes, or on the bulb of tubes without bases. The prefix "J", abbreviation for "JAN", shall be used only as specified in 3.7.1.1. The manufacturer's code name which signifies qualification shall not be used on any part of the tube.

[3] Tubes can be "JAN" branded by the manufacturer only after they have passed Government inspection at the place of manufacture during the manufacturing process. As proof of Government source inspection the inspector imprints his "Eagle" acceptance stamp on the packing lists accompanying each shipment of tubes. In addition the inspector affixes his signature to a written certification that the tubes have been source inspected and passed all the required tests.

[4] See § 3.7.1.2 of note 3 *supra*.

istered the contract. Model had not obtained such approval and, in fact, certified that the material offered was new, recently manufactured, had never been used, and was not former surplus of any type.

In May 1963 defendant Page wrote Model advising that United was able to supply JAN 4X150G electron tubes at a price of $32.00 per tube.[5] In that same correspondence Page assured Model that United would test the tubes according to the applicable military specifications and would certify the tubes by Government inspection. Defendants knew that the tubes were for use in the Government contract, even though they had never seen a copy of that agreement.

Pursuant to the above arrangement in July 1963 defendants shipped ten 4X150G tubes to Model for sampling. Following a preliminary inspection of the sample tubes, Model sent a form to United advising of the following facts concerning the tubes:

no code date
no JAN marking
electrically OK
physically OK
Decision: accepted

In December 1963 Model issued to United a purchase order for 1008 JAN 4X150G electron tubes at a total cost of $32,256.00 and a unit price of $32.00 per tube. Shortly thereafter United shipped 120 of the subject tubes to Model. In early January 1964, however, Model returned the tubes as unacceptable because they had not been JAN branded or Government source inspected.

Model then became concerned that United might not be able to furnish tubes that met Government specifications and requested United confirm that the

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[5] In 1963 non-obsolete JAN 4X150G tubes had a market price of $40.00 per tube.

correct tubes could be furnished. By letter of January 24, 1964, signed by defendant Bornstein, Model was advised as follows:

> This letter is to stand as affirmation by us that we are fully equipped and capable to delivery (sic) any and all electron tubes and semi-conductors on which we accept purchase orders from you to the applicable military specifications and government source inspection supplied as required.

The defendants then affixed or caused to be affixed to the tubes in their possession in January 1964 [6] the following markings:

(1) The JAN designation;
(2) The manufacturer's qualification code (CIM); and
(3) The acceptance date (6318).

The defendants knew these markings were false and inaccurate. Before shipping the falsely branded tubes to Model, defendants sent the tubes to Saxon Laboratories, Inc. in New York for a MIL. E-1 electrical test. After the test was completed and the tubes were found operable, a facsimile of a Government inspector's "Eagle" stamp was affixed to each of the defendants' packing lists accompanying the shipments to Model.[7] This stamping was accomplished at Saxon

[6] United purchased 380 tubes from Arthur H. Richardson, Inc. at a price of $17.50 per tube. Arthur H. Richardson, Inc. was a franchised distributor of Eimac and had purchased 451 tubes, which had been placed in termination inventory due to a design change, for a price of $15.52 per tube.

[7] These packing lists did not, however, contain the Government inspector's written certification that the tubes had been source inspected and had passed all the required tests. See note 4 *supra*.

Laboratories by someone other than defendants Page and Bornstein.

There were twenty-one packing lists covering the tubes and containing their serial numbers.[8] The packing lists comprised three separate shipments to Model. Accompanying each shipment was a "Certificate of Compliance" signed by defendant Page as vice-president of United. The certificate stated as follows:

> It is hereby certified that all materials used in the manufacture of parts in the quantity called for on the subject purchase order received by Model . . . conform to the material and/or manufacturing specifications as called for on said purchase order.
>
> Physical, Electrical, and/or Chemical test reports are on file with us or with our suppliers for examination and indicate conformance with applicable specification requirements.

United billed Model on three separate invoices and was paid $32.00 per tube by Model.

The United States received 684 4X150G tubes from Model under the contract. Of this total number of tubes 442 were found to contain:

(1) A false JAN designation;
(2) A false manufacturer's qualification code (CIM); and
(3) A false acceptance date (6318).

These falsely branded tubes were removed from the radio kits purchased from Model. Only 397 of these tubes can be identified by serial number as having been supplied by defendants. Serial numbers for the remaining forty-five improperly branded tubes are unknown and cannot be directly traced to defendants.

[8] One additional United packing list was found in Model's possession in July 1954, however, this list does not reference the contract number and does not refer to any tubes by serial number.

Model submitted to the United States thirty-five claims for payment under the contract. These claims were designated as invoices. Each invoice included claims for payment for tubes that had been "JAN" branded by the defendants although defendants did not prepare any of Model's invoices or have knowledge of the manner in which claims were presented to the Government. Model's thirty-five claims were paid with eight Government vouchers. The cost to the United States to replace the falsely branded tubes was $40.82 per tube.[9]

In May 1966 defendants Bornstein and Page pleaded guilty to Count II of an indictment which charged that from January 24, 1964, through June 3, 1964, they conspired to cause to be submitted to an agency of the United States false statements and representations to material facts and conspired to possess forged documents enabling Model to obtain money from the United States. Defendants were each given a suspended sentence and placed on probation for two years. Neither defendant was fined. In December 1966

[9] The stipulation submitted to this Court stated as follows:

> 17.(o) The cost to the United States in replacing the 442 falsely marked 4X150G electron tubes was $40.82 per tube or a total of $18,042.44 *which is subject to proof by affidavit or voucher.* (Emphasis added)

Approximately one month after the stipulation was received the United States Attorney submitted documentation, which technically was not an "affidavit or voucher," showing, *inter alia*, that the per tube cost of replacement was $40.82. Counsel for defendants strenuously object to our receipt of this documentation and a subsequent affidavit submitted under cover of June 4, 1973. We accept this documentation for the sole purpose of meeting the Government's required standard of proof on the issue of replacement cost. Extraneous facts contained in these additional Government documents in no way alter the stipulation. Defendants' motion to strike the Government's claim for actual damages, which motion was made at oral argument, is therefore denied.

Model paid the United States $18,000.00 in settlement of a claim brought against Model for the 442 falsely branded tubes.

The legal issues which confront the Court are as follows: did the defendants violate the False Claims Act; if the Court finds that the Act was violated, what actual damages, if any, were suffered and how are they to be computed; and, how is the number of forfeitures to be computed.

I. STATUTORY VIOLATION

The applicable section of the False Claims Act, 31 U.S.C.A. § 231, provides, in pertinent part:

> Any person . . . [1] who shall . . . cause to be made . . . or cause to be presented, for payment or approval, to . . . any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department . . . thereof, knowing such claim to be false, fictitious, or fraudulent, [2] or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any . . . voucher . . . claim, certificate, affidavit . . . knowing the same to contain any fraudulent or fictitious statement . . . [3] or who enters into any agreement . . . or conspiracy to defraud . . . the United States, or any department . . . thereof, by obtaining or aiding to obtain the payment . . . of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act. . . .

Applying the findings of this Court to the above quoted statutory language, it is an inescapable conclusion that defendants Bornstein and Page violated the

provisions of section 231 of the Act. Defendants knew the materials they were furnishing Model were for use in a Government contract. They were also aware that their initial shipment of 120 tubes was unacceptable because the tubes lacked the required "JAN" brands. By knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, defendants caused Model to present thirty-five claims for payment to the United States. Each claim included a request for payment on behalf of some falsely branded tubes. The defendants, therefore, knew that the portion of Model's claims for payment which encompassed the falsely branded tubes would be fraudulent. This constitutes a clear violation of "clause one" of section 231 of the Act.

By submitting to Model vouchers and certificates containing statements defendants knew were fraudulent, Bornstein and Page aided Model in obtaining payment for fraudulent claims. This is a violation of "clause 2" of section 231 of the Act. Finally it has been established by clear and convincing proof that defendants agreed or conspired to aid to obtain the payment of fraudulent claims, thereby violating "clause 3" of section 231 of the Act. The evidence that convinces the Court of the existence of this agreement or conspiracy is as follows: After having been notified that the tubes were unacceptable for lack of "JAN" markings, each defendant, on at least one occasion, either certified or stated to Model that materials furnished by United pursuant to Model's purchase order would meet the applicable Government specifications; defendants admitted either affixing or causing to be affixed the false "JAN" markings; and defendants pleaded guilty to Count II of an indictment charging them with conspiracy.

It is immaterial that defendants did not deal directly with the Government. That they were one step removed from direct contact with the Signal Supply Agency does not vitiate or diminish their liability. In *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537 (1943), the Court stated that the provisions of the Act "indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Id.* at 544–45. In that case the Court held the Act applicable to contractors who, by collusive bidding, obtained contracts with municipalities and school districts of a state for work on federal Public Works Administration projects. The contractors were paid for their work with federal funds even though actual payments were made in the names of the local authorities.

The Court of Appeals for the Third Circuit has ruled, on at least two occasions, that the wrongdoer need not be in a direct contractual relationship with the Government in order to be liable for false claims under the Act. In *United States* v. *Rohleder,* 157 F. 2d 126 (3d Cir. 1946), defendant Rohleder had entered into sixteen subcontractors with the Cramp Shipbuilding Company pursuant to a contract between Cramp and the Navy to complete certain shipyard improvements. The scheme for which Rohleder was found liable under the Act involved collusive bidding on items included in work under the subcontracts. Since the fraud was committed with respect to the subcontracts, Rohleder was held liable for sixteen $2,000 forfeitures. *Id.* at 131. *Accord, United States* v. *Veneziale,* 268 F. 2d 504, 505 (3d Cir. 1959); *see United States* v. *Ueber,* 299 F. 2d 310 (6th Cir.), *aff'd following remand for further findings of fact,* 303 F. 2d 462 (6th

Cir. 1962); *Murray & Sorenson, Inc.* v. *United States*, 207 F. 2d 119 (1st Cir. 1953).

II. ACTUAL DAMAGES SUFFERED

Although the Government removed 442 falsely branded 4X150G tubes from the radio kit sets supplied by Model, the proofs show that only 397 of these tubes can be traced by serial number as having originated with defendants. Notwithstanding the similarity between the markings on these 397 tubes and those on the remaining forty-five tubes not identified by serial number, this Court is not persuaded that defendants are liable for these latter tubes. This is particularly so in light of the fact that a total of 684 4X150G tubes were received from Model and there has been no showing that United was the sole supplier of 4X150G tubes.

The Government has established that the per unit cost to replace the tubes was $40.82. Since defendants were liable for only 397 falsely branded tubes, the total amount of actual damages attributable to them is $16,205.54. Whether the falsely branded tubes have absolutely no value to the Government and therefore warrant no application of credit to defendants on their behalf is an issue over which the litigants are diametrically opposed. The parties do agree, however, that the rule of law to be applied in determining the amount of actual damages was stated in *United States* v. *Ben Grunstein & Sons, Co.*, 137 F. Supp. 197 (D.N.J. 1955).

The essence of the fraudulent scheme in that case involved circumvention of the meat inspection system of the United States Army. Defendants in *Ben Grunstein* were charged with knowingly supplying substandard meats to the Army. After disposing of a discovery matter, the court entered a supplemental

opinion dealing with the measure of damages to be applied in that case. The court cited *Marcus* as specifically rejecting the application of the so-called "out-of-pocket" rule of damages in a False Claims Act proceeding. In fact, the court in *Ben Grunstein* felt that the Supreme Court in *Marcus* had applied what is called the "benefit-of-the-bargain" rule of damages. The court in *Ben Grunstein* stated as follows:

> [The "benefit-of-the-bargain" rule,] in a case where the fraud is as to the goods received by the person defrauded . . . is the difference between the value of what plaintiff would have received, but for the fraud, and the value of what he did receive in fact, due to the fraud. This might be more simply stated as being the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received. *United States* v. *Ben Grunstein & Sons, Co., supra* at 205.

The court adopted the "benefit-of-the-bargain" rule holding that the just measure of actual damages plaintiff had sustained was the value of the meat defendant was under contract to deliver less the value of the meat in fact delivered. *Id.* at 210.

In the case *sub judice* the value of the goods the Government should have received but for defendants' fraud is analogous to the per tube cost of replacing the tubes supplied by defendants. As previously stated that sum is $16,205.54. The Government contends that since no permission to supply other than "JAN" branded tubes was given to Model the entire lot of falsely branded tubes had absolutely no value. Therefore no credit should be applied to lessen the amount of actual damages suffered. Defendants, of course, take issue with this contention.

Defendants argue that although the tubes did not

meet the required specifications they did have value, at least to the defendants, and were never returned by the Government. At the very minimum, defendants continue, they should be given credit for the per unit price of $15.52 paid by Arthur H. Richardson, Inc.[10] It could also be argued that the value of the tubes actually furnished should be computed by utilizing either the per unit price of $17.50 paid by United or the per unit price of $32.00 paid by Model. The issue need not be decided on this basis, however, because the $18,000.00 settlement paid by Model must be considered, and when this is done the actual value of the falsely branded tubes, for purposes of determining actual damages, becomes moot.

The Government advances two arguments concerning application of the $18,000.00 settlement as a credit on behalf of defendants. First, the Government argues that no portion of Model's settlement can be used as a credit applied against the actual damages caused by Bornstein and Page. Secondly, if the Court decides that defendants are entitled to credit, then it may be applied only after doubling the actual damages of $18,042.44. This Court rejects both these arguments for the reasons below.

With respect to the denial of credit altogether, the Government's argument is basically that the $18,000.00 settlement came from a source collateral to defendants and, therefore, should not inure to their benefit. The Government supports this argument by directing the Court's attention to the "collateral source rule" and to *United States* v. *Klein,* 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd,* 356 F. 2d 983 (3d Cir. 1966).

The "collateral source rule" is a tort concept which allows a plaintiff to recover full damages from a defendant who is liable for the injury, notwithstanding

[10] See note 7 *supra.*

the fact that plaintiff has already been paid his salary or pension during disability, or had his medical expenses paid by another, or out of the proceeds of an accident insurance policy. In this case plaintiff may receive double payment for the same items. The defendant wrongdoer, however, does not get the benefit of payments that plaintiff receives from a collateral source. 3 F. HARPER & F. JAMES, THE LAW OF TORTS, § 25.22, at 1343–44 (1956). The key to the application of this rule, which denies credit to the wrongdoer, is a determination that the source of the benefit to plaintiff is truly collateral to the wrongdoer. In the case *sub judice* Model and United were contracting parties, and it is clear that in any action brought against Model on the main Government contract, United could have been joined as a third party if the goods it furnished were alleged to have been the cause of the breach of the main contract. That Model chose not to pursue United when the Government brought its claim against Model does not adversely affect this Court's finding that Model's actions in settling the claim were at least partially motivated by the actions of defendants. In this respect at least the settlement was not truly collateral and will not operate to bar application of a credit on defendants' behalf.

United States v. *Klein, supra,* is not apposite. In that case defendants had procured fraudulent mortgage loan applications to induce the Veterans Administration to issue loan guarantees to veterans who were supposedly living in the houses. After the loans went into default, foreclosure proceedings were instituted. The court refused to credit to defendant Klein a $60,000.00 payment that the Government had collected on account of its claim against First Federal Savings & Loan Association of Greene County. First Federal had participated in the scheme to procure

Veterans Administration approval for the loans. The court refused to apply the credit, not solely because Klein was a non-contributing defendant, but because the evidence was incompetent to show who paid the $60,000.00 or for what reason it was paid. The court stated as follows:

> We know that a number of others were involved in the Bretz deals as participants. We don't know what the involvements were. We don't know what claims, if any, there were and against whom. No evidence was introduced that First Federal paid any money, nor was there any evidence of why the $60,000.00 was paid. To make a deduction here that it was basically and totally on account of the Klein claim is pure speculation. 230 F. Supp. at 443.

This Court cannot say that the result would have been the same if defendant had carried his evidential burden.

Klein is also of assistance in rejecting the Government's contention that if we are to apply a credit then it should be applied only after doubling the figure of $18,042.44. This very issue was raised by the defendant in *Klein*. The court stated as follows:

> Certain credit amounts were received by the plaintiff after foreclosures of the properties. The Government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined.
>
> Accordingly, *the credit should be first deducted from the single damages as finally determined and the remainder doubled* for the purpose of determining the amount of damages to which the plaintiff was entitled. [Emphasis Added]. *Id.*

Having determined that the $18,000.00 settlement should inure to defendants' benefit and be deducted from the single damages, the Court must now consider the computation of actual damages. Since Model paid $18,000.00 for 442 falsely branded tubes, the per tube value of that settlement was $40.72. The value of the 397 tubes attributable to defendants was $16,165.84, and the value of what the Government should have received on behalf of defendants was $16,205.54. Single damages, therefore, are $39.70, doubled $79.40.

III. FORFEITURES

The Government contends that thirty-eight $2,000 forfeitures should be assessed for violations of the Act committed and caused to be committed by the fraudulent acts of defendants. Those forfeitures are as follows: One forfeiture of defendants' twenty-one false "Certificates of Compliance" issued to Model; one forfeiture for causing a facsimile of a Government source inspector's "Eagle" acceptance stamp to be imprinted upon each of defendants' twenty-one packing lists; one forfeiture for acquiring surplus 4X150G tubes and "JAN" branding them; thirty-five forfeitures for causing Model to present to the United States thirty-five separate fraudulent claims for payment. Defendants, on the other hand, argue that the maximum number of forfeitures that possibly can be imposed are three, one for each of the three shipments to Model, and that this Court should impose only one forfeiture for the one contract between United and Model.

The Court rejects outright the Government's claim for the three individual forfeitures. First, there has been no evidence establishing that defendants issued *twenty-one* false "Certificates of Compliance" to Model. Secondly, there has been no evidence that defendants caused the "Eagle" acceptance stamp to be imprinted on their packing lists. Thirdly, since the Act proscribes the submission of fraudulent claims for payment to the United States, the Court does not reach the question whether falsely branding the tubes in and of itself constitutes a violation of the Act. Accordingly, the litigants' remaining contentions must be considered.

Courts have consistently applied the Act's forfeiture section to impose various numbers of forfeitures for individualized acts occurring within a single continuing course of conduct. *E.g., United States ex rel. Marcus* v. *Hess, supra; United States* v. *Ueber, supra; United States* v. *Rohleder, supra.* It is also clear, as the Court has previously noted, that a person may be held liable under the Act even though the fraudulent claims presented to the United States were not submitted by him. Typically the false claim is submitted by a main contractor who has been caused to submit a false claim through the fraudulent acts of a subcontractor. *E.g., United States ex rel Marcus* v. *Hess, supra; Murray & Sorenson, Inc.* v. *United States, supra,* at 123. There is no difficulty, therefore, in assessing the statutory forfeitures against defendants Bornstein and Page. The only problem is determining the correct number of forfeitures to be imposed.

In this respect *United States* v. *Ueber, supra,* is particularly instructive. In that case defendant Ueber was a subcontractor to two separate corporations which had prime contracts with the Government.

Each of Ueber's subcontracts provided fixed hourly rates for "direct labor" furnished pursuant to the subcontracts. Furthermore, the payments for "direct labor" were to be in lieu of all other charges, including overhead. The complaint charged that during a six month period Ueber had charged as direct labor the time of three of its employees which actually was overhead or "indirect labor." Ueber had presented a total of 422 invoices to the prime contractors containing such charges. In turn the two prime contractors had presented a total of fifty-four vouchers to the United States. Each of these vouchers represented a claim for payment based on at least some of the 422 invoices submitted by Ueber. The district judge assessed a $2,000 forfeiture for each of the fifty-four vouchers submitted through the two prime contractors for a total of $108,000.00 in forfeitures. 299 F. 2d at 312.

On appeal Ueber contended that the assessment of fifty-four forfeitures based on the vouchers submitted by the prime contractors was error. He argued that only two forfeitures should have been assessed, one for each subcontract. The Court of Appeals for the Sixth Circuit rejected Ueber's argument stating:

> The conduct proscribed by § 231, as applicable here, consisted of acts of causing false claims to be presented to the government. Each voucher which Ueber caused to be submitted through [the prime contractors] was a separate act justifying an assessment of a separate forfeiture. . . . Plaintiff's complaint did not charge that the entering into subcontracts . . . in any way violated § 231. These contracts were valid. The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act. [Citations Omitted]. *Id.* at 313.

As in *Ueber,* there is no charge that fraudulent conduct procured the contract between Model and United or that the contract itself violated section 231. The fraudulent acts in the present case occurred after the contract had been negotiated. Those acts caused Model to submit thirty-five false claims, each of which constituted a separate violation justifying a separate forfeiture.

United States ex rel Marcus v. *Hess* and *United States* v. *Rohleder* do not compel a different result and do not support defendants' alternative contentions that a minimum of one forfeiture, for the one contract between Model and United, and a maximum of three forfeitures, one for each shipment from United to Model, should be imposed. Both *Hess* and *Rohleder* involved collusive bidding schemes regarding public works projects and subcontracts respectively. Forfeitures were based on the number of projects in *Hess* and on the number of subcontracts in *Rohleder.* In those cases the incidence of the fraud was localized, in *Hess* on each of the projects, and in *Rohleder* on each of the subcontracts. In this case the incidence of the fraud was localized in the claims submitted by Model to the United States.

Accordingly counsel for the United States shall submit an order consistent with this opinion giving judgment for the United States in the amount of $70,079.40.

JOHN J. KITCHEN,
Judge, U.S. District Court.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
APR 10 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-712

UNITED STATES,
Petitioner

—*v.*—

PHILIP L. BORNSTEIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 6, 1974
CERTIORARI GRANTED JANUARY 27, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-712

UNITED STATES, *Petitioner*

—v.—

PHILIP L. BORNSTEIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Civil Docket 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

PHILIP L. BORNSTEIN, GERALD PAGE AND UNITED NATIONAL LABS, Division of Sonora Electromatics, Inc., DEFENDANTS

BASIS OF ACTION:

False Claims Statute; presentation of false claim re manufacture of radio kit

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
11- 6-67	Complaint filed 11-3-67.
11- 6-67	Summons issued.
1-10-68	Summons returned served on Gerald Page on 12-5-67; on Philip L. Bornstein on 1-8-68; Not Served as to United National Labs, Division of Sonora Electromatics, Inc., filed
1-19-68	Answer of Gerald Page; crossclaim against Philip L. Bornstein and United National Labs, Division of Sonora Electromatics, Inc.; and Demand for Jury, filed 1-18-68
1-24-68	Answer of Philip L. Bornstein, filed
5-16-68	Plaintiff's Request for Admissions directed to defendant, Gerald Page, filed 5-15-68
5-16-68	Plaintiff's Request for Admissions directed to defendant, Philip L. Bornstein, filed 5-15-68
8- 7-68	Interrogatories of Gerald Page and plaintiff's answer filed 8-6-68.

DATE	FILINGS—PROCEEDINGS
10-28-68	Plaintiff's documents in answer to certain interrogatories of the defendant, Gerald Page, filed 10-25-68
3-24-69	Supplemental Interrogatories of Gerald Page and plaintiff's answers filed 3-21-69.
4-14-69	Plaintiff's answer to supplemental interrogatory No. 2, filed 4-11-69
4-18-69	Plaintiff's answers to interrogatories Nos. 8, 9 and 25, filed 4-17-69
5- 1-69	Answers of defendant Philip L. Bornstein to Request for Admissions, filed 4-30-69
5- 5-69	Pre-trial order, filed 5-2-69 (Shaw) Notice mailed.
6-17-69	Plaintiff's supplemental answers to interrogatories of Gerald Page, filed 6-16-69
6-18-69	Plaintiff's supplemental answer to interrogatory No. 18 of Gerald Page, filed 6-17-69
6-19-69	Plaintiff's copies of Model Invoices with Material Inspection and Receiving Reports in compliance with Gerald Page's interrogatory No. 18, filed 6-18-69
6-19-69	Affidavit of service of copies of plaintiff's Model Invoices with Material Inspection and Receiving Reports in compliance with Gerald' Page's interrogatory No. 18, filed 6-18-69.
1- 8-71	Notice of Motion by plaintiff for partial summary judgment; to strike the third affirmative defense in answer of Gerald Page, and affidavit of service, filed 4-6-71. (Brief submitted)
1- 8-71	Plaintiff's list of documentary exhibits, filed 4-7-71
1-14-71	Ordered action placed on non-jury calendar. (Shaw) (4-8-71)

DATE	FILINGS—PROCEEDINGS
1-26-71	Notice of motion by plaintiff for partial summary judgment; as to defendants, Gerald Page and Philip L. Bornstein; to strike the third affirmative defense in the answer of defendant, Gerald Page, and affidavits of service, filed 4-22-71 (ret. 5-24-71) (No brief submitted)
2- 1-71	Hearing on plaintiff's motion for partial summary judgment as to defendants, Gerald Page and Philip Bornstein; to strike the third affirmative defense in answer of the defendant, Gerald Page. Ordered motion denied. (Shaw) (11-29-71)
10- 4-72	Order of Re-Assignment and Re-Allocation to Judge Cohen, filed 10-3-72. (Coolahan) Notice mailed.
3-19-73	Supplement to List of Documentary Exhibits, filed 3-15-73
3-19-73	Supplemental Answer to Interrogatories, filed
3-19-73	Second Supplement to List of Documentary Exhibits, filed 3-16-73
3-21-73	Second Supplemental Answer of Plaintiff to Interrogatories, filed
3-26-73	Trial moved before Hon. John J. Kitchen, Judge and Jury; Case to be submitted on Briefs.
3-29-73	Stipulation of Settlement placed upon the Record;
4-13-73	Stipulation of Facts by U.S.A., filed
6-26-73	Various letters, filed
6-26-73	Opinion, filed (Kitchen) Notices mailed
7-12-73	Judgment in favor of Plaintiff, United States of America, and against Defendants, Philip L. Bornstein and Gerald Page, jointly and severally, in the sum of $70,079.40, and costs, filed (Kitchen) Notice mailed.
7-19-73	Letter Re: Costs, filed

DATE	FILINGS—PROCEEDINGS
7-19-73	Statement of Plaintiff's costs, taxed at $70.84, filed
7-19-73	Order of Dismissal as to defendant United National Labs, Division of Sonora Electromatics Inc., a corporation of the State of New Jersey, without costs, filed (Kitchen) Notice mailed
8-20-73	Notice of Appeal by Deft. Philip L. Bornstein, filed 7-26-73 (Copies mailed Clerk, USCA, U.S. Attorney & Stavis, Richardson, etc.)
8-20-73	Notice of Appeal, filed 8-16-73 (Copies mailed Clerk, USCA, Jack Ballan, Esq. & Stavis, Richardson, etc.)
8-23-73	Record on Appeal, mailed Clerk, U.S. Court of Appeals. (Notice furnished Counsel)
9- 7-73	Notice of Appeal by defendant Gerald Page, filed 9-6-73 (Copies mailed to Clerk, U.S.C.A. and Jack Ballan, Esq.)
9- 9-74	Opinion of U.S. Court of Appeals, filed
9-27-74	Certified copy of Judgment of U.S. Court of Appeals affirming district court as to double damages and the award of a single forfeiture; and vacating award of forfeitures in excess of $2,000.00, filed

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Filed January 6, 1967]

COMPLAINT

The plaintiff, the United States of America, by its attorney, David M. Satz, Jr., United States Attorney for the District of New Jersey, (appearing by Assistant United States Attorney, Carolyn E. Arch), for its complain alleges herein:

1. This is a civil action brought by the United States pursuant to the provisions of Sections 3490 and 5438 of the Revised Statutes, 12 Stat. 696, Title 31 U.S.C. Sections 231, 233. This Court has jurisdiction of this action by virtue of Section 3491 of the Revised Statutes, 31 U.S.C. Section 232, as amended.

2. At all times hereinafter mentioned, defendant United National Labs, Division of Sonora Electromatics, Inc. (hereinafter United) was and is a corporation of the State of New Jersey with principal offices of business at No. 295 Vreeland Avenue, Paterson, New Jersey, was engaged in the business of buying and selling election tubes, and is within the jurisdiction of this Court.

3. At all times hereinafter mentioned, defendant Philip L. Bornstein was part owner and General Manager of United and defendant Gerald Page was part owner, Vice-President and Manager of Sales of defendant United. Defendant United was operated and managed by defendants Philip L. Bornstein and Gerald Page. Defendant Philip L. Bornstein resides at No. 51 Spottswood Road, Glen Rock, New Jersey, and is within the jurisdiction of this Court. Defendant Gerald Page resides at No. 140 Dean Street, Glen Rock, New Jersey, and is within the jurisdiction of this Court.

4. None of the defendants were in the military or naval forces of the United States, or in the militia or

called into or actually employed in the service of the United States, during the times involved in this action.

5. At all times hereinafter stated Model Engineering and Manufacturing Corp., Inc., (hereafter Model), was and is an Indiana corporation, with principal offices at Huntington, Indiana, engaged in the business of manufacturing and building electronic radio equipment and radio sets.

6. At all times hereinafter stated the United States Army Signal Supply Agency and the Chicago Procurement District were divisions of the Department of the Army, an agency and instrumentality of the plaintiff, vested with the responsibility for the procurement of electronic equipment and parts for the Department of the Army, as authorized by 10 U.S.C. 2304 (public law 1028, 84th Congress).

7. By Supply Contract No. DA-36-039-AMC-01080 (E), (hereafter Contract) dated August 29, 1962, between the United States Signal Supply Agency and Model, Model undertook to manufacture for and supply to the Department of the Army Radio Kit Sets, each of which was to contain the following sub-items: A radio transmitter kit, a radio receiver kit, a power supply kit, a radio transformer kit, and a radio accessory kit. The total dollar volume of the contract and its supplements was $2,077,861.76.

The component parts list of this contract specified that Sub-item #1-5-33, to be included in the radio accessory kits, called for:

> "2 ea. Tube, Electron JAN type 4X150G Per Specifications, HIL. E-1 and T55 MIL. E-1, 302F dated 4/17/57"

The Specifications pertinent to JAN type tube 4X150G provided as follows:

3.7.1.1. "JAN" prefix. The designation of all tubes procured under this specification shall bear the prefix "JAN", except that in the case of small tubes (T-6 ½ bulb outline or smaller) the prefix "J" shall be used. Tubes procured under a contract which either permits

or requires any changes in any of the conditions or requirements of this specification shall not bear the prefix "JAN" nor any abbreviation thereof. The "JAN" brand is registered under number 504860 by the United States Patent Office and shall be used only on tubes which have passed Government inspection.

3.7.1.2 Qualification code. The qualification code marking follows the "JAN" prefix. This designation is assigned to the manufacturer for use on all tube types of his manufacture which have passed the qualification tests and have been approved for inclusion on the Qualified Products List. The code-designating letters shall be as listed in Publication NAVSHIPS 900,152. The code-designation shall be used only by the manufacturer to whom it has been assigned and only as a part of the designation on tubes manufactured at the plant to which the qualification approval was granted. In the case of small tubes (see 3.7.1.1), the manufacturer's code designation may be abbreviated by deleting "C" (the indication that the code has been assigned to a commercial organization in the United States or Canada).

3.7.1.2.1 Tubes not having qualification. Tubes procured under this specification from a source of supply for which no qualification approval has been granted, shall be marked "JAN" followed by the type on the side wall of the base, or on the envelope of metal, lock-in tubes, or other glass tubes, or on the bulb of tubes without bases. The prefix "J", abbreviation for "JAN", shall be used only as specified in 3.7.1.1. The manufacturer's code name which signifies qualification shall not be used on any part of the tube.

8. The JAN 4X150G electron tubes are not manufactured for commercial use; they are used only with military equipment.

9. The only authorized manufacturer of the 4X1500 electron "JAN" tube was and continues to be Eitel McCullough, Incorporated, of San Carlos, California (hereafter Eimac). The "JAN" designation on the tubes which can only be placed thereon by the manufacturer after they have passed Government source inspection, is an abbreviation for the *J*oint *A*rmy *N*avy qualification

approval standard registered by the United States Patent Office. A tube with "JAN" designation indicates it has been inspected and approved by the United States Government at the source (place) of manufacture.

10. Model, as contractor, made the following certification concerning used or surplus material:

> "The offeror/contractor certifies that the material offered is new, recently manufactured, has never been used and is not former surplus of any type."

11. Due to the requirements of the equipment specifications and complete "JAN" tests as required by the "JAN" specifications the use of a commercial tube which is non- "JAN" branded would require prior written approval from the Government Contracting Officer administering the contract. No such approval had been given to Model under the contract.

12. In October, 1963 defendants Philip L. Bornstein and Gerald Page, acting through defendant United, offered to sell electron tube type 4X1500 to Model, which were required by Model under the Contract, and Model Ordered 120 JAN 4X150G electron tubes from defendants.

13. In October, 1963, two shipments of 4X150G tubes, 120 in number, were sent by the defendants to Model, but did not have "JAN" stamped on the tubes which indicated to Model that the tubes were not source inspected as called for under the Contract. Model returned them to the defendants with the request that they be source inspected and properly stamped.

14. Model became concerned that United might not be able to furnish the required tubes which met the specifications of the contract and asked that United confirm in writing that proper tubes could be furnished.

15. By letter dated January 24, 1964, signed by defendant Philip L. Bornstein, Vice-President, United National Labs, Model was advised as follows:

"This letter is to stand as affirmation by us that we are fully equipped and capable to delivery (sic) any and all electron tubes and semi-conductors on which we

accept purchase orders from you to the applicable military specifications and government source inspection supplied as required."

16. Thereafter the defendants jointly and severally undertook a scheme to defraud Model and the plaintiff. Said fraudulent scheme consisted of defendants' acquisition of non-"JAN" 4X150G tubes which were defective, obsolete and without warranty; imprinting and causing to have imprinted on such tubes the Government approval designation "JAN"; making or causing to be made a United States Government Inspector's Stamp (a one inch square in which there is an eagle with three stars over it); stamping and causing to be stamped on their purchase orders a United States Government Inspector's stamp; and shipping and causing to be shipped to Model to fulfill the Contract non-"JAN" 4X150G electron tubes with the "JAN" designation imprinted thereon, together with purchase orders with a United States Government Inspector's stamp mark thereon.

17. Thereafter Model accepted shipments from the defendants of the 4X150G electron tubes, believing that they were "JAN" 4X150G electron tubes as called for under the Contract. From the period of October 1963, through February 1964 Model purchased electron tubes type 4X150G from the defendants. The Sales Invoices issued by the defendants for sales of 4X150G electron tubes to Model designated as "JAN", are as follows:

INVOICE	DATE	QUANTITY
A 11073	1/16/64	60
A 11351	1/27/64	20
A 11356	1/29/64	10
A 11357	1/29/64	6
A 11355	1/29/64	18
A 11354	1/29/64	18
A 11363	1/30/64	20
A 11364	1/30/64	20
A 11362	1/30/64	20
A 11361	1/30/64	20

INVOICE	DATE	QUANTITY
A 11360	1/30/64	20
A 11372	2/ 4/64	13
A 11371	2/ 5/64	17
A 11370	2/ 5/64	20
A 11369	2/ 5/64	18
A 12263	2/18/64	20
A 12268	2/18/64	20
A 12262	2/18/64	20
A 12265	2/18/64	20
A 12264	2/18/64	29
A 12260	2/18/64	20
A 12261	2/18/64	20

Each of these invoices contained the following reference:

"Gov. Contract No. DA 36-039-AMC-1080 E"

A total of 442 of these defective electron tubes were received by Model from the defendants. All of such tubes were used by Model to fulfill the Contract.

18. In furtherance of the above-described fraudulent scheme, defendants issued a "certificate of compliance" with each shipment of electron tubes to Model. The "Certificate of Compliance" was signed, "Gerald Page, Vice-President, United National Labs," and read as follows:

"It is hereby certified that all materials used in the manufacture of parts in the quantity called for on the subject purchase order received by Model Engineering & Mfg. Corp. conform to the material and/or manufacturing specifications as called for on said purchase order.

Physical, Electrical, and/or Chemical test reports are on file with us or with our suppliers for examination and indicate conformance with applicable specification requirements."

19. As a direct consequence of the aforesaid fraudulent scheme, the claims for payment submitted by Model to

the United States or to higher tier contractors of the United States were false and fraudulent and were then known by the defendants to be false and fraudulent, and the presentation of the said false and fraudulent bills and claims were caused solely and directly by the aforesaid wrongful conduct of the defendants.

20. The defendants, and each of them, thereby became and is jointly and severally liable to the United States.

21. As a further direct consequence of the aforesaid fraudulent scheme, the United States was caused to sustain total damages in the amount of $18,042.44, computed as follows:

> The unit price of "JAN" 4X150G electron tube is $40.82 each; 442 x $40.82 = $18,042.44.

WHEREFORE, the plaintiff, the United States of America, demands judgment against the defendants in the sum of double the damages sustained as a result of defendants' violations of the False Claims Statute; $2,000.00 against each of the defendants for their individual acts in furtherance of the fraudulent scheme; $2,000.00 against each of the defendants for each and every other act done in violation of the False Claims Statute, together with interest and costs of this suit.

DAVID M. SATZ, JR.
United States Attorney

By: /s/ Carolyn E. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action File No. 1141-67

[Filed January 19, 1968]

ANSWER OF DEFENDANT, GERALD PAGE, CROSS-CLAIM AND DEMAND FOR TRIAL BY JURY

Defendant Gerald Page answers the complaint herein as follows:

1. This defendant admits the allegations of Paragraph 1.

2. This defendant admits the allegations of Paragraph 2.

3. This defendant denies the allegations of Paragraph 3, insofar as those allegations apply to him except that he admits that he resides at 140 Dean Street, Glen Rock, New Jersey and that he denies knowledge or information as to the allegations with respect to the other defendants.

4. This defendant admits the allegations of Paragraph 4.

5. This defendant denies knowledge or information as to the allegations of paragraph 5.

6. This defendant denies knowledge or information as to the allegations of paragraph 6.

7. This defendant denies knowledge or information as to the allegations of paragraph 7.

8. This defendant denies knowledge or information as to the allegations of paragraph 8.

9. This defendant denies knowledge or information as to the allegations of paragraph 9.

10. This defendant denies knowledge or information as to the allegations of paragraph 10.

11. This defendant denies knowledge or information as to the allegations of paragraph 11.

12. This defendant denies the allegations of paragraph 12 except that he admits that defendant United offered

to sell electronic tube Type 4X150G to Model and that Model ordered 120 JAN 4X150G electronic tubes from United.

13. This defendant denies the allegations of paragraph 13 with respect to him and denies knowledge or information thereof with respect to the other defendants.

14. This defendant denies knowledge or information with respect to the allegations of paragraph 14.

15. This defendant denies knowledge or information with respect to the allegations of paragraph 15.

16. This defendant denies the allegations of paragraph 16 as to him and denies knowledge or information thereof with respect to the other defendants.

17. This defendant denies the allegations of paragraph 17 as to him and denies knowledge or information thereof with respect to the other defendants.

18. This defendant denies the allegations of paragraph 18 except that he admits signing substantially the form quoted therein and relies on the original thereof for the language thereof.

19. This defendant denies the allegations of paragraph 19.

20. This defendant denies the allegations of paragraph 20.

FIRST AFFIRMATIVE DEFENSE

Model ordered and accepted the tubes referred to in the complaint knowing or having reason to know that they did not comply with the terms of its contract with the plaintiff. Any damage suffered by the plaintiff was as a result of the conduct of Model and not the result of the conduct of the defendants herein.

SECOND AFFIRMATIVE DEFENSE

Any acts and conduct of the defendant Page were carried out at the direction of the defendant Bornstein and in all respects this defendant acted as an agent and servant of defendants Bornstein and United and without knowledge on his part of any fraud or other wrongdoing.

THIRD AFFIRMATIVE DEFENSE

The plaintiff suffered no damage as a result of the alleged acts and conduct of the defendants.

CROSS-CLAIM

Defendant Page repeats the allegations of the Second Affirmative Defense set forth above. As a result thereof, the defendants Bornstein and United are required and obligated to indemnify and reimburse the defendant Page for all claims, damages and payments which he may be required to make under the complaint herein.

WHEREFORE defendant Page demands judgment:

(a) Dismissing the complaint herein with costs,
(b) On his crossclaim, for damages against the defendants Bornstein and United in whatever amount may be found against him in favor of plaintiff together with costs;

Defendant demands a trial by jury of all issues in this action.

STAVIS, RICHARDSON, KOENIGSBERG AND ROSSMOORE
Attorneys for defendant
Gerald Page

By /s/ William Rossmoore
William Rossmoore
A Member of the Firm

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Filed January 19, 1968]

ANSWER

Defendant, Philip L. Bornstein, by and through his attorney, Jack Ballan, by way of Answer says:

1. Defendant, Philip L. Bornstein, has no information either to affirm or deny paragraph 1.
2. Said defendant admits paragraph 2.
3. Said defendant admits paragraph 3.
4. Said defendant admits paragraph 4.
5. Said defendant has no information either to affirm or deny paragraph 5.
6. Said defendant has no information either to affirm or deny paragraph 6.
7. Said defendant has no information either to affirm or deny paragraph 7.
8. Said defendant has no information either to affirm or deny paragraph 8.
9. Said defendant has no information either to affirm or deny paragraph 9.
10. Said defendant has no information either to affirm or deny paragraph 10.
11. Said defendant denies paragraph 11.
12. Said defendant denies paragraph 12.
13. Said defendant denies paragraph 13.
14. Said defendant has no information either to affirm or deny paragraph 14.
15. Said defendant admits paragraph 15.
16. Said defendant denies paragraph 16.
17. Said defendant has no information either to affirm or deny paragraph 17.
18. Said defendant denies paragraph 18.
19. Said defendant denies paragraph 19.

20. Said defendant denies paragraph 20.
21. Said defendant denies paragraph 21.

/s/ Jack Ballan
JACK BALLAN
Attorney for defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Filed May 18, 1968]

REQUEST FOR ADMISSIONS

TO: STAVIS, RICHARDSON, KOENIGSBERG and ROSSMORE, ESQS.

Attorneys for defendant Gerald Page
744 Broad Street
Newark, New Jersey

The Plaintiff, the United States of America, hereby requests the defendant, Gerald Page, pursuant to the provisions of Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten days after service of this Request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at trial, that the following statements are true:

1. That the defendant, Gerald Page, in several signed, sworn statements furnished by him to the Federal Bureau of Investigation stated that it was the defendant, Philip L. Bornstein, who caused the fictitious "JAN" designation to be placed on the electron tubes shipped to Model Engineering and Manufacturing Corp., Inc. (Model).

2. That the defendant, Gerald Page, in a signed, sworn statement furnished by him to the Federal Bureau of Investigation, admitted that he knew that a United States Government Inspector's Stamp (a one inch square in which there is an eagle with three stars over it) had been:

(a) procured by defendant Philip L. Bornstein;

(b) used by defendant Philip L. Bornstein on purchase orders for Electron tubes shipped by defendant United National Labs, Division of Sonora Electromatics,

Inc., (United) to Model required by Model to fulfill Government Contract No. DA-36-039-AMC-01080(E).

3. That the defendant, Gerald Page, in a signed, sworn statement furnished by him to the Federal Bureau of Investigation stated that he knew that the electron tubes shipped from United to Model were falsely branded "JAN-CIM" and were falsely dated.

4. That the defendant, Gerald Page, in a signed, sworn statement furnished by him to the Federal Bureau of Investigation stated that he knew that the tubes sold to Model by United through United—Page, Inc., were "falsely" inspected.

5. That in an indictment dated December 8, 1965, found by the Grand Jury in and for the District of New Jersey, sitting at Newark, the defendant, Gerald Page, was charged with violation of Title 18 U.S.C., Sections 1001, 1002, 371, and 286.

6. That on March 11, 1966, the defendant, Gerald Page, entered a plea of guilty before the Honorable Anthony T. Augelli, United States District Court Judge to Count II of said Indictment which charged as follows:

That from on or about January 24, 1964 through June 3, 1964, in Glen Rock and Paterson, in the State and District of New Jersey,

PHILIP L. BORNSTEIN;
GERALD PAGE

did knowingly, wilfully, and unlawfully, conspire, confederate and combine, and agree with one another, to commit offenses against the United States as follows:

A) PHILIP L. BORNSTEIN and GERALD PAGE conspired to cause to be submitted to an agency of the United States of America, that is, the Chicago Procurement District of the Department of the Army, false and fraudulent statements and representations to material facts in a matter which was then pending before the said agency of the United States, contrary to the provisions of Section 1001, Title 18, U.S.C.

B) PHILIP L. BORNSTEIN and GERALD PAGE conspired to possess false and forged documents

for the purpose of enabling the Model Manufacturing Company to obtain from the United States of America money under a contract that the Model Manufacturing Company then had with the Chicago Procurement District of the Department of the Army, which contract called for the use of items which had been falsely represented by the documents possessed by PHILIP L. BORNSTEIN and GERALD PAGE, contrary to the provisions of Section 1002 of Title 18, U.S.C.

And the Grand Jury further charges:

That in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the said defendants did commit divers overt acts, among which were the following:

a) On or about January 27, 1964, PHILIP L. BORNSTEIN and GERALD PAGE shipped Invoice No. A11351, accompanied by certain radio tubes to Model Manufacturing Company.

b) On January 24, 1964, PHILIP L. BORNSTEIN and GERALD PAGE sent a letter to Model Manufacturing Company.

In violation of Title 18, U.S.C., Section 371.

7. That pursuant to the aforesaid plea of guilty the defendant, Gerald Page, was sentenced by the Honorable James A. Coolahan, Judge, United States District Court, to imprisonment for two years, the imposition of which was suspended, and placed on probation for two years.

8. That the attached documents designated Exhibit "A", "B" and "C", respectively, photostatic copies of sworn, signed statements furnished by the defendant, Gerald Page, to the Federal Bureau of Investigation are genuine.

DAVID M. SATZ, JR.
United States Attorney

By: /s/ Carolyn F. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

XEROX COPY

40 DEAN ST.
GLEN ROCK, N.J.
OCT 6, 1964

LIBERTY ST. N.Y.C.

I, Gerald Page, make the following statement of my own free will. I was born on October 27, 1925, in Brooklyn, New York. From 1955 until 1962, I was the sole owner of a one man company known as Page Electronics, whose main activity was the buying and selling of surplus electron tubes. I did an annual gross of between $45,000 and $60,000. In January, 1963, my company merged with and was absorbed by a corporation owned by Philip L. Bornstein, called United-National Labs, Inc., with offices at 99 President St., Passaic, N. J. Since Mr. Bornstein's firm did an annual business of $600,000, It was determined by his accountant, Mr. R. O. Bertoli, that I was entitled to 10% of the shares of the newly merged firms, based solely on the ratio of annual gross volume. This I received. In March, 1963, Mr. Bertoli, was instrumental in bringing a Mr. Alfred B. Averell into the firm, who in turn brought someone with $100,000 to invest, and United-National Labs, Inc. thereafter became known as Sonora Electromatics, Inc. Of the 400,000 shares authorized by Sonora, it was determined that I receive 29,000 shares, which I did get. I was elected a Vice-President of the firm, with a (roughly) 7% interest.

In May-June of 1963, Sonora moved to 295 Vreeland Ave., Paterson, N. J. Duties were distributed as follows: Mr Averell and Mr. Bertoli were in charge of the fiscal matters; Mr. Bornstein, since he had many judgements and lawsuits pending against himself, decided not to appear as a corporate officer, but simply as General Manager. He was, however, in charge of the buying and selling of tubes and transistors. Mr. Bornstein, Mr. Bertoli, and Mr. Averell signed the checks for the company, I was subordinate to Mr. Bornstein. Under me, there were between two to four (the number varied depending on Sonora's financial health) salesmen, whose function was solely to sell tubes. Also as part of the production end of the business, there were some 18 employees--- all prior employees of Mr. Bornstein's at United-National Labs, Inc., who did various tasks; Mr. Chester Szpila (12 years with Mr. Bornstein) was foreman. Mrs. Theresa Hibo (14 years in Mr. Bornstein's employ) was forelady. There were a number of women who did sorting, testing, boxing, etc.--- all of whom had been in Mr. Bornstein's employ for periods ranging from 5-10 years. Incidentally, to the best of my knowledge, Mrs. Bornstein owned in her name, her husband's portion of over 100,000 shares of the new Sonora firm.

Part of my duties as Sales Manager, were to follow up tentative enquiries and quotations originally initiated by Mr. Bornstein. There had been correspondence with a firm in Huntington, Indiana named Model Engineering and Mfg. Corp., in our files before I joined United-National Labs, and Mr. B. asked me to "follow it up." I called Model and spoke to Mr. Norm Tipton, a purchasing agent there, and learned that, of six items Mr. Bornstein had quoted on of electron tubes, Model was prepared to place an order for one of those items, tube type 4X150G. Tipton first wished to see 10 samples of the sort of material we would be delivering, in order that his engineering department could satisfy itself as to the quality of what we were delivering. Accordingly, in June of July of 1963 , we sent 10 tubes, type 4X150G to Model for their evaluation. About two months or so later we received a form in the mail from Model attesting to the results of their preliminary inspedtion; as well as I can remember, the results were as follows:

"10—4X150G——no code date
no JAN marking
electrically OK
physically OK
DECISION: ACCEPTED

Mr. Bornstein thereupon call d a company in Chicago, Arthur Richardson and Co., 608 S. Dearborn, and arranged to purchase from them the amount of 4X150G tubes we would need to complete the Model purchase order---I think the original order called for some 962 pieces. We purchased the tubes for $20 each. It was, by the way, from the Richardson Co., that we bought the ten tubes we sent to Model for their test and approval. To insure that Richardson would save the tubes for us alone, Mr. B. sent him a $1000 deposit, which was to apply toward the last order of tubes we bought. As we purchased those tubes from Richardson , we were to pay for them on their arrival at our premises. Shipments to Model, according to the schedule set forth in their P. O., were to begin on November 1st, 1963 and subsequent shipments were to be made on the first of each month thereafter until completion. So, in mid-October, Mr. B. bought 60 tubes from Richardson, sent them, when they arrived to Saxon Labs, 2470 North Jerusalem Road, North Bellmore, L. I., N. Y., to be tested simply for short-circuits or "leakage", and on receipt of the good tubes back from Saxon, forwarded them on to Model. This procedure was followed for the first two shipments.

Some time in the beginning of January 1964, I received a telephone call from Model Engineering. They had asked for Mr. Waxberg originally (a salesman), who after listening,

Exhibit A

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claimed he could not help them and went and told Mr. B. When Model called again, Mr. B. did not speak to them, but asked me to accept the call. I did so. At the other end of the phone were both Tipton, the P. A. and Bob Smart, the chief buyer for Model They asked whether I had any prior experience with government contracts. I told them that I had not, whereupon they proceeded to indicate where we had been remiss; the tubes were not marked JAN, there was no evidence of government source inspection (which would have been indicated by the presence of a particular rubber stamp on the packing slip); they were not properly code dated (which meant that they had to be manufactured within one year of the date of the sale). They suggested that before I get them into any more "hot water", I contact the General Testing Labs in Moonachie, N. J. and learn proper procedure there. I did so, and also learned that the testing charges ($15 per tube) would be prohibitive when added to our individual cost. Model called every day to inquire about our progress, and told us that they were in danger of incurring severe penalties for non-delivery, since they had had to send back the first 120 tubes as inadaquate. I told them I was making little or no progress at all.

We had at this time a working agreement with Cetron Electronics in Geneva, Illinois, and had them buy for our account 60 or so pieces of this tube directly from Eimac , at a cost of $36 per tube. We had agreed to sell to Model for $32 each. We requested the purchase by Cetron to ease some of the pressure. Sixty pieces, however, was not enough of an easement, so I therefore in my next conversation with Model offerred to cancel the entire order. They, however, insisted we perform according to the obligation the purchase order placed us under, and agree with no cancellations. In one of the conversations between Tipton and myself, Model inquired whether we were familiar with Saxon Labs. We were, since Jerry Francoeur the proprietor of Saxon had often done commercial testing for us; and indeed had checked these 120 tubes which they were returning. Tipton explained that Saxon had done work for them in the past and was acceptable by their standards. A call to Saxon verified that he could indeed provide us with source inspection, but that the tubes had to be JAN when he received them, as no inspector he worked with could attest to witnessing a JAN test on a commercial tube. I relayed this information to Phil, who subsequently informed me that the matter was taken care of.

A day or so later Chester told me we had JAN 4X150 G's in the back ready to send to Saxon for test. I called Saxon and notified him to be ready to work around the clock to get these done properly and promptly since the customer was in a "sweat" for them, and we commenced shipments to Saxon. Our procedure was to have our truck driver, Pat Lore, take the tubes to Saxon, pick them up a day or so later when Saxon notified us he had completed the test, and drive over to Long Island City where Saxon's "resident" inspector regularly stayed (the premises were Olympic Radio). The inspector would call Saxon and verify that the packing slips with the serial numbers therein had actually been tested to mil spec, and then put his "eagle" on the packing slip. The driver then brought the tubes back to Vreeland Ave., and we made shipment to Model. We continued this procedure until March 12, 1964 when the premises Sonora occupied at 295 Vreeland Ave. burned to the ground, incidentally destroying 100 tubes which were to be shipped to Model on the following day.

Offices were set up at 2185 Lemoine Ave., Fort Lee, N. J. buth within 10 days, Mr. Bertoli and Mr. Averell informed Mr. B. and myself that our services were no longer required.

On April 1, 1964, Mr. Philip Bornstein and I opened up United-Page Inc., with offices in Glen Rock. My share of the business was 11% and Mr. B. owned, in his wife's name, the other 89%.

Toward the end of April or the beginning of May, we received a call from Norm Tipton. He had, he told me, been trying all over to get 4X150G's to complete his order. Saxon indicated later that Tipton had tried to buy from Unity Electronics, Elizabeth, N. J. and even from Saxon himself. Saxon suggested that Model contact United-Page. I told Phil what Model wanted and he said "Take the order." He bought 4X150 Gtubes from various sources: Ted Dames, 308 Hickory St., Arlington, N. J., Eagle Electronics, 2295 San Pablo Ave., Berkeley California, and Sam Weiner, 56 Howard St., NYC, to name a few. These tubes, when we received them already bore the JAN designation, and most were code dated March 1964--- well within two of the requirements needed to meet approval. Obviously, these were tubes from a recent contract termination. When the first shipment of tubes was supposed to have been made ready to ship to Saxon, Phil pulled out of his pocket a rubber stamp which, when inked, would make the Government Inspector's "Eagle"--he told me that "Tessie found it in her garage." I asked him what he intended doing with it, and he pointed out that the tubes were "obviously" perfect, many of them still originally sealed as they must have come directly from Eimac just a short time before, and since he felt that the firm needed the billing as fast as possible, he did not propose to waste time going through the test procedure

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but would stamp the packing slips with the "Eagle" himself, and ship the tubes directly to Model. He did this again in June on another shipment to Model. A bit later, Model called and explained that they could wait no longer, but events had put them so far behind in deliveries, they were at this time forced to purchase whatever tubes remained on the order directly from Zimac. That was the last I heard from Model.

On August 14, two FBI agents questioned me with respect to the tubes we sent Model from Vreeland Ave., Patterson. When they concluded my interview, and before they spoke to Phil, I approached him in another room, told him what they had asked me, and inquired of him, "By the way, how did we manage to ship Model JAN tubes from Sonora?" His answer was, "I had Tossie re-do the Richardson lot. She put JAN-CIM on the tubes, and dated them so that they fell into the proper time period."

In a sense, this was actually the first I really knew for a fact, what had been accomplished. I simply had not wanted to know.

On Sunday, August 16th, Phil telephoned Jerry Francouer of Saxon Labs at his home and arranged a meeting with Jerry at the Laboratory, for later in the day. He asked Jerry to do him a fozvor and "——see if your inspector friend won't cover for us by saying that he did perform the inspection on the tubes United-Page shipped Model." Jerry said he'd see what could be done. On Monday, Jerry called Phil and notified him that FBI men had already seen the inspector and gone over his records, so it was too late there.

To sum up, the tubes shipped from Sonora to Model were falsely branded "JAN-CIM" and falsely dated; the tubes sold from United-Page were falsely "inspected."

I, Gerald Page, being duly sworn, make the above statements freely and voluntarily to David W. Oldham and Eugene W. Valey, who have identified themselves to me as special agents of the Federal Bureau of Investigation.

I have been told that I do not have to make a statement & any statement I do make can be used against me in a court of law. Special agent David W. Oldham has told me that I have the right to talk to a lawyer of my own choice, which I have done before saying anything at all, & no threats, promises, or offers of reward have been made in order to induce me to make this statement.

I have prepared the above statement consisting of 3 typewritten pages and swear that it is the truth.

Gerald Page

Sworn to and subscribed before me on
October 6, 1964 at Paterson, N.J.
David W. Oldham - Special Agent F.B.I. Paterson N.J. 10/6/64
Witness:
Eugene W. Valey Special Agent FBI Hackensack N.J. 10/6/64.

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140 Dean Street
Glen Rock, New Jersey
October 6, 1964

Part 2———1

I, Gerald Page, make the following statement of my own free will. I was born on October 27, 1925, in Brooklyn, New York. I live at 140 Dean Street, Glen Rock, N. J. On April 1st, 1964, Phil Bornstein and I organized a suplus electronics business known as United-Page, Inc., with offices at 7 Main St., Glen Rock, N. J. My share of the business was 11% and Phil owned, in his wife's name, the other 89%. The following narrative has to do with matters other than those pertaining to Model Engineering and Mfg. Corp., which involve Government Source Inspection.

United-Page Inc. has a Canadian account named Cesco Electronics Ltd., 275 Craig St. W. Montreal, Canada. In one of my conversations with Cesco's purchasing agent, sometime in April 1964, he asked whether we could supply JAN tubes. (I should explain that tubes are designated, in the surplus trade, as either a) Commercial: which means only that the tube was produced by a commercial manufacturer; and b) JAN; which means that the tube was orignally made for some Governmental application, and that to be acceptable to the Government, it had to pass more stringent tests than those that applied to the Commercial types. It is common for suplus dealers to request from each other: "I need commercials only on this deal." Or, conversely, "I have to have JANs for this sale." In this context JAN does not mean that the buyer wishes Source Inspection performed—— he only wants what he considers a more rugged and reliable tube. So when Cesco asked for JAN tubes, I replied in the affirmative. Subsequently we got a number of orders for JAN tubes from them, and the only notations were the designations "JAN" alongside each particular type. Phil, to enhance his sale in his customer's eyes, and allow him to think he was getting even more than he asked for, proceeded to "Eagle" the packing slips pertaining to these orders. Cesco now believed he was getting Source Inspection even when ordered tubes at surplus prices. In May—June, we began receiving orders from Cesco bearing the notation: "For Canadian Dept. of Transport", with an official Canadian Governmental Purchase Order Number marked therein. They were now requesting Source Inspection! I told Phil I would prefer not filling these orders, but he replied, that——"as long as we have Saxon give it a good stiff commercial test, we're OK." So we filled some of these early orders and the "Eagle" was affixed in each case. After several shipments, I got a telephone call from a Miss Grinda, attached to the office of the Inspector of Naval Material in Mountainside, N. J. She told me she had a number of purchase order follow-ups pertaining to Cesco Electronics, and would I tell her when and where a Naval Inspector could perform his inspection. I told her we had cancelled those orders as we were unable to comply with the requests for source inspection. As a matter of fact, on a pretext, I had Cesco return to us a recently "Eagled" shipment, and on its arrival at United-Page, had a credit issued them and cancelled the order unilaterally. I also unilaterally cancelled all the remaining purchase orders from Cesco that were still in the place, where source inspection was needed. Cesco has repeatedly asked us to deliver the material, and I have insisted we are unable to. Lately, Phil has been making promises to Cesco that, "in a week or so," he'll be able to begin avew delivering GSI orders. In addition to Cesco, basically the same procedures have been carried out with orders received from Thompson Radio Supply, 182 East Long St., Columbus, Ohio; and Jetronics, Inc., Philadelphia, Penn. The activities mentioned above were done from May through August, 1964, on a more or less simultaneous basis.

On August 14, 1964, after two FBI agents interviewed both me and Phil, he gave me the "Eagle" stamp and asked me to destroy it. He cautioned Tessie, Chester and myself that we should "....deny knowledge of anything, or they'll lock you up and throw the key away; for you're all as guilty as I am But if we stick together, we can beat them." He pulled out of their normal sequence in our files all the purchase orders we had gotten from the above noted companies, all the packing slips, and all the covering invoices---everything that in any way bore a reference to Government Source Inspection. He put these papers in the drawer of a small end-table adjoining his desk, on which he keeps a dictating machine. He told me he intended re-writing these papers so that no reference to GSI or Mil Spec (a term meaning Military Specification) would appear. I took the "Eagle" stamp Phil gave me, but instead of destroying it, held on to it.

With respect to the "Eagle" stamp, to the best of my knowledge, it was Pat Lore, our truck driver, who obtained it. Pat's home phone number, I believe, is 843-3118; his answering service, I think is HU-9-9062. Pat has a close friend at Krengel Stamp Works (Telephone 298-6475) named, I think, Jack Kelly. Pat said that Kelly would do anything for him, and had made the "Eagle" that Tessie purportedly found in her garage. In fact, Pat has claimed that he has had a few "EAGles" made for some of the "boys" in the trade

Exhibit B

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"who are my friends". Since Phil fired Pat, he has been unable to get stamps made by Kelly.

I explained the entire situation to my lawyer, Mr. Leon Savetsky on Monday, Aug. 17, and he advised that the best thing to do under the circumstances was for Phil and myself to go to the FBI and make a full and complete statement of the truth.. He further advised, "Don't destroy the stamp, save it; and don't destroy any documents. If Phil insists on destroying anything, don't you take any part in it." On Aug. 24th, my wife, I, my attorney and Phil met at the offices of Phil's attorney to discuss this matter. My lawyer again advised that we go to the FBI and make a full statement. Phil indicated that he would like more time in order to be able to consult still another attorney. Aweek or so passed before he consulted another man. Phil reported that this attorney, like his original attorney, had advised to "sit tight." Several more days passed and it became evident that Phil was not going to make a statement. I decided then that I would leavehin, and disclose the facts on my own.

While awaiting Mr. Savetsky's making an appointment with the FBI, I came into my office on Thursday, Sept. 21st, and found our secretary working on some thirty invoices. Recognizing the name on one and the nature of its contents, I asked her what she was doing. She told me that Mr. Bornstein had told her to re-write that pile of invoices, omitting the words JAN and any other references to GSI that appeared on the original. (The girl's name is Joan Haug, she lives in Fair Lawn, N. J. and is being married on Oct. 10th). I blew up at Phil and reminded him o his word to at least not tamper with any evidence; but his answer was that he wanted the place clean in the event we were ever raided or our books subpoenaed.

Thereafter, on Tuesday, Sept. 29, I went to the office of the FBI in Patterson, and told Agents Mr. Vehey and Mr. Oldham in substance what I have set forth in this statement and in the accompanying statement pertaining to the Model transactions and turned over to them the "Eagle" stamp which Phil gave me.

I, Gerald Page, being duly sworn, make the above statements freely & voluntarily to David W. Oldham and Eugene W. Vahey, who have identified themselves to me as Special agents of the Federal Bureau of Investigation.

I have been told that I do not have to make a statement, & any statement I do make can be used against me in a court of law. Special agent David W. Oldham has told me that I have the right to talk to a lawyer of my own choice, which I have done before saying anything at all. No threats, promises, or offers of reward have been made in order to induce me to make this statement.

I have prepared the above statement consisting of 2 typewritten pages and swear that it is the truth.

Gerald Page

Sworn and subscribed to before
me on October 6, 1964 at Paterson, N.J.
David W. Oldham, Special Agent F.B.I. Paterson, N.J. 10/6/64

Witness:
Eugene W. Vahey, Special Agent, F.B.I. Hackensack, N.J. 10/6/64.

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EXHIBIT C

Paterson, New Jersey
15 October 1964

I, Gerald Page, being duly sworn hereby make the following free and voluntary statement to David W. Oldham and Eugene W. Vahey, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation.

I have been told that I do not have to make a statement, and any statement that I do make may be used against me in a court of law. Special Agent David W. Oldham has told me that I have the right to talk with a lawyer of my own choice or anyone else, before saying anything at all. No threats, promises, or offers of reward have been made in order to induce me to make this statement.

I was born October 27, 1925 at Brooklyn, New York, and currently reside at 140 Dean Street, Glen Rock, New Jersey. I am presently a part owner of United-Page, Incorporated, Glen Rock, New Jersey. From 1955 until 1962, I was the sole owner of a one man company known as Page Electronics, New York, New York, whose main activity was the buying and selling of surplus electronic tubes. I did an annual gross business of between $45,000.00 and $60,000.00. During January, 1963, my company merged with and was absorbed by a corporation owned by Philip L. Bornstein, called United National Labs, Inc., with offices at 99 President Street, Passaic, New Jersey. Since Mr. Bornstein's firm did an annual business of $600,000.00, it was determined by his accountant, Mr. R. O. Bertoli, that I was entitled to 10 per cent of the shares of the newly merged firms. This was based solely on the ratio of annual gross volume of business. The investment of merchandise, cash and other assets was at about the same ratio. As a result, I received 10 per cent of the stock of the newly formed company.

In March, 1963, Mr. Bertoli was instrumental in bringing a Mr. Alfred B. Averell into the firm who,

in turn, brought Douglas B. Westin into the firm with $100,000.00. The United National Labs., Inc., thereafter became known as Sonora Electromatics, Inc. Of the 400,000 shares authorized by Sonora, it was determined that I receive 29,000 shares, which I did get. I was elected a vice president of the firm with approximately a 7 per cent interest.

During May or June, 1963, Sonora moved to 295 Vreeland Avenue, Paterson, New Jersey. Duties were distributed as follows: Mr. Averell and Mr. Bertoli were in charge of the fiscal matters; Mr. Bornstein, since he had many judgments and law suits pending against himself, decided not to appear as a corporate officer, but simply as general manager. He was, however in charge of buying and selling of tubes and transistors. Mr. Bornstein, Mr. Bertoli and Mr. Averell signed the checks for the company; I was subordinate to Mr. Bornstein. Under me, there were two to four salesman whose function was solely to sell tubes. Also, as part of the production end of the business, there were eighteen employees, all of which were prior employees of Mr. Bornstein's at United National Labs, Inc. Chester Szpila, who had been with Bornstein for approximately twelve years, was foreman. Theresa Hibo, who had been with Bornstein approximately fourteen years, was forelady. Pat Lore did the trucking for Bornstein. Approximately sixteen other individuals did sorting, testing, boxing, et cetera.

Philip Bornstein's share of the stock in this company was held in the name of his wife, Mrs. Bornstein. She held over 100,000 shares of the new Sonora firm.

Part of my duties as sales manager were to follow up tentative inquiries and quotations originally initiated by Mr. Bornstein. There had been correspondence with a firm in Huntington, Indiana, named Model Engineering and Manufacturing Corporation in our files before I joined United National Labs, and Mr. Bornstein asked me to "follow it up." I called Model and spoke to Mr. Norm Tipton, a purchasing agent at Model, and learned that of six items Mr. Bornstein had quoted on of electron tubes, Model was prepared to place an order for one

of those items, tube type 4X150G. Tipton first wished to see ten samples of the sort of material we would be delivering, in order that his engineering department could satisfy itself as to the quality of what we were delivering. Accordingly, in June or July, 1963, we sent ten tubes, type 4X150G, to Model for their evaluation. These ten tubes were obtained from Arthur Richardson and Company, Chicago, Illinois a tube distributor. About two months or so later, we received a form in the mail from Model attesting to the results of their preliminary inspection. To the best of my recollection the results were as follows: 10 4X150G—no code date, no JAN marking, electrically OK, physically OK, decision: accepted.

Mr. Bornstein thereupon called Arthur Richardson and Company, 608 South Dearborn Street, Chicago, Illinois, and arranged to purchase from them the amount of 4X150G tubes we would need to complete the Model purchase order. I think the original order called for approximately 968 tubes. We purchased the tubes for $20.00 each. To insure that Richardson would save the tubes for us alone, Mr. Bornstein sent him a $1,000.00 deposit which was to apply towards the last order of tubes we bought. As we purchased these tubes from Richardson we were to pay for them on their arrival at our premises. Shipments to Model, according to the schedule set forth in their purchase order were to begin November 1, 1963, and subsequent shipments were to be made on the 1st of each month thereafter until completion.

In mid-October, Mr. Bornstein bought sixty tubes from Richardson, sent them when they arrived to Saxon Labs, 2470 North Jerusalem Road, North Bellmore, Long Island, New York, to be tested simply for short circuits or "leakage," and on receipt of the good tubes back from Saxon, forwarded them on to Model. This procedure was followed for the first two shipments.

Sometime during the beginning of January, 1964, I received a telephone call from Model Engineering. They had asked for Mr. Waxberg, one of our salesmen, who after listening claimed he could not help them and

so informed Mr. Bornstein. When Model called again, Mr. Bornstein did not speak to them, but asked me to accept the call. I did so. At the other end of the phone were both Tipton, the purchasing agent, and Bob Smart, the chief buyer for Model. They asked whether I had any prior experience with government contracts. I told them that I had not, whereupon they proceeded to indicate where we had been remiss: the tubes were not marked JAN, there was no evidence of government source inspection which would have been indicated by the presence of an eagle on the packing slip, they were not properly code dated, (they had to be manufactured within one year of the date of the sale). Tipton and Smart suggested that before I get them into any more "hot water" I contact the General Testing Labs in Moonachie, New Jersey, and learn proper procedure there. I did so and also learned that the testing charges, in the amount of $15.00 per tube, would be prohibitive when added to our individual cost. Model called every day to inquire about our progress, and told us that they were in danger in incurring severe penalties for nondelivery, since they had had to send back the first 120 tubes as inadequate. I told them I was making little or no progress at all.

We had, at this time, a written agreement with Cetron Electronics, located at Geneva, Illinois, and had them buy for our account sixty or so pieces of this tube directly from Eimac, a manufacturer of this tube, at a cost of $36.50 per tube. We had agreed to sell to Model the tubes for $32.00 each. We requested the purchase by Cetron to ease some of the pressure. Sixty pieces, however, were not enough to take care of the pressure that Model was putting on us. I, therefore, in my next conversation with Model offered to cancel the entire order. Model, however, insisted we perform according to the obligation the purchase order placed upon us, and to adhere to the agreement with no cancellations. In one of the conversations between Tipton and myself, Tipton inquired whether we were familiar with Saxon Labs. We were, since the proprietor Jerry Francoeur had often done commercial testing for us and

had originally checked the 120 tubes which Model returned to us. Tipton explained that Saxon had done work for them in the past and was acceptable by their standards. A call to Saxon verified that he could, indeed, provide us with source inspection, but that the tubes had to be JAN tubes when he received them as no inspector he worked with could attest to witnessing a JAN test on a commercial tube. I gave this information to Philip Bornstein, who subsequently informed me "that the matter was taken care of."

A day or so later, Chester Szpila told me we had JAN 4X150G's in the back ready to send to Saxon for tests. I called Saxon and notified him to be ready to work around the clock to get these done properly and promptly since the customer was in a "sweat" for them, and we commenced shipments to Saxon. Our procedure was to have our truck driver Pat Lore take the tubes to Saxon, pick them up a day or so later when Saxon notified us he had completed the test, and drive over to Long Island City where Saxon's "resident inspector" regularly stayed. This inspector, working for the United States Government, was Irving Chergin and he was stationed at Olympic Radio Company, Long Island City. The inspector would call Saxon and verify that the packing slips with the serial numbers thereon had actually been tested to military specifications and then put his "eagle" on the packing slip. The "eagle" is a rubber stamp in possession of the United States Government inspector which, when placed on the shipping document, denotes that the items being shipped were inspected at source. Pat Lore then brought the tubes back to Vreeland Avenue, Paterson, New Jersey, and we made shipments to Model. We continued this procedure until March 12, 1964, when the premises Sonora occupied at 295 Vreeland Avenue, Paterson, New Jersey, burned to the ground. This fire destroyed 100 tubes which were to be shipped to Model on the following day.

New offices were set up at 2185 Lemine Avenue, Fort Lee, New Jersey. Ten days later, Mr. Bertoli and Mr. Averell informed Mr. Bornstein and myself that our services were no longer required.

On April 1, 1964, Philip Bornstein and myself opened up United-Page, Inc., with offices at Glen Rock, New Jersey. My share of the business was 11 per cent, and Mr. Bornstein owned, in his wife's name, the remaining 89 per cent.

Toward the end of April or the beginning of May, we received a call from Norm Tipton of Model Engineering. He had, he told me, been trying all over to buy 4X150G's to complete his order. Saxon indicated later that Tipton had tried to buy from Unity Electronics, Elizabeth, New Jersey, and even from Saxon himself. Saxon suggested that Model contact United-Page. I told Bornstein what Model wanted and he said, "Take the order." He bought 4X150G tubes from various sources. Tubes were bought from Ted Dames, Arlington, New Jersey; Eagle Electronics, Berkeley, California; and Sam Weiner, New York City. These tubes, when we received them, already bore the JAN designation, and most were code dated March, 1964; with the word JAN already on the tube and the code date as late as March, 1964, two of the requirements needed to meet approval were already had on the tubes. Obviously, these tubes were a recent contract termination.

When the first shipment of tubes was supposed to have been made ready to ship to Saxon, Bornstein pulled out of his pocket a rubber stamp which when inked would make the government inspector's "eagle." Bornstein told me that "Tessie found it in her garage." Tessis is Theresa Hibo, the forelady. I asked Bornstein what he intended doing with it, and he pointed out that the tubes were "obviously" perfect—many of them still originally sealed as they must have come directly from Eimac just a short time before—and since he felt that the firm needed the billing as fast as possible, he did not propose to waste time going through the test procedure. Bornstein stated that he would stamp the packing slips with the "eagle" himself and ship the tubes directly to Model.

Bornstein again stamped the shipping document on a second shipment made during June, 1964, to Model. Subsequently to this second shipment, Model called and

explained that they could wait no longer, but events had put them so far behind in deliveries they were, at this time, forced to purchase whatever tubes remained on the order directly from Eimac. That was the last I heard from Model.

On August 14, 1964, immediately subsequent to my interview with Agents David W. Oldham and Eugene W. Vahey of the Federal Bureau of Investigation regarding the tubes sent to Model Engineering, I advised Philip Bornstein of the nature of the inquiry by the Federal Bureau of Investigation. At this time I said to Bornstein, "By the way, how did we manage to ship JAN tubes from Sonora to Saxon Laboratories for testing?" His answer was, "I had Tessie redo the Richardson lot. She put JAN-CIM on the tubes and dated them so that they fell into the proper period."

In a sense, this was actually the first I really knew for a fact what had been accomplished. I simply had not wanted to know.

On Sunday, August 16, Philip Bornstein telephoned Jerry Francoeur, owner of Saxon Labs, at his home and arranged a meeting with Francoeur at the laboratory for later in the day. He asked Francoeur to do him a favor. He wanted Francoeur to see his friend the inspector to see if he would cover up for United-Page, Inc., by saying that he performed the inspection on the tubes shipped by United-Page, Inc., to Model. I was present at this meeting which took place on the premises of Saxon Labs. On Monday, August 17th, Jerry Francoeur telephoned us at United-Page, Inc., and in a three-way conversation told us that Agents of the F.B.I. had already seen the inspector, gone over his records, and that he, the inspector, could therefore not do the favor requested.

On Friday, August 14th, 1964, when the two special agents had concluded their interviews of Mr. Bornstein and myself, and had gone, Mr. Bornstein took his 'eagle' stamp from his desk drawer, gave it to me, and asked me to destroy it. I did not do this.

I have read the foregoing statement consisting of this and eleven other typewritten pages. I have initialed

each page and all corrections. This statement is true to the best of my knowledge.

/s/ Gerald Page

Sworn to and subscribed before me on October 15, 1964 at Paterson, N.J.

/s/ David W. Oldham
Special Agent F.B.I.
Paterson, N.J.

Witness:

/s/ Eugene W. Vahey
Special Agent, F.B.I.
Hackensack, N.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Filed May 15, 1968]

REQUEST FOR ADMISSIONS

TO: JACK BALLAN, ESQ.
Attorney for defendant Philip L. Bornstein
14-25 Plaza Road
Fair Lawn, New Jersey 07410

The Plaintiff, the United States of America, hereby requests the defendant, Philip L. Bornstein, pursuant to the provisions of Rule 36 of the Federal Rules of Civil Procedure to admit within ten days after the service of this Request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at trial, that the following statements are true:

1. That the defendant, Philip L. Bornstein, in a signed, sworn statement furnished by him to the Federal Bureau of Investigation stated that the sale of Electron tubes by United National Labs, Division of Sonora Electromatics, Inc. (United) to Model Engineering and Manufacturing Co., Inc. (Model) was handled by the defendant, Gerald Page.

2. That in an indictment dated December 8, 1965, found by the Grand Jury in and for the District of New Jersey, sitting at Newark, the defendant, Philip L. Bornstein, was charged with violation of Title 18 U.S.C., Sections 1001, 1002, 371, and 286.

3. That on March 11, 1966, the defendant, Philip L. Bornstein, entered a plea of guilty before the Honorable Anthony T. Augelli, United States District Court Judge to Count II of said indictment which charged as follows:

That from on or about January 24, 1964 through June 3, 1964, in Glen Rock and Paterson, in the State and District of New Jersey,

PHILIP L. BORNSTEIN;
GERALD PAGE

did knowingly, wilfully, and unlawfully, conspire, confederate and combine, and agree with one another, to commit offenses against the United States as follows:

A) PHILIP L. BORNSTEIN and GERALD PAGE conspired to cause to be submitted to an agency of the United States of America, that is, the Chicago Procurement District of the Department of the Army, false and fraudulent statements and representations to material facts in a matter which was then pending before the said agency of the United States, contrary to the provisions of Section 1001, Title 18, U.S.C.

B) PHILIP L. BORNSTEIN and GERALD PAGE conspired to possess false and forged documents for the purpose of enabling the Model Manufacturing Company to obtain from the United States of America money under a contract that the Model Manufacturing Company then had with the Chicago Procurement District of the Department of the Army, which contract called for the use of items which had been falsely represented by the documents possessed by PHILIP L. BORNSTEIN and GERALD PAGE, contrary to the provisions of Section 1002 of Title 18, U.S.C.

And the Grand Jury further charges:

That in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the said defendants did commit divers overt acts, among which were the following:

a) On or about January 27, 1964, PHILIP L. BORNSTEIN and GERALD PAGE shipped Invoice No. A11351, accompanied by certain radio tubes to Model Manufacturing Company.

b) On January 24, 1964, PHILIP L. BORNSTEIN and GERALD PAGE sent a letter to Model Manufacturing Company.

In violation of Title 18, U.S.C., Section 371.

7. That pursuant to the aforesaid plea of guilty the defendant, Philip L. Bornstein, was sentenced by the Honorable James A. Coolahan, Judge, United States District Court, to imprisonment for two years, the imposition of which was suspended, and placed on probation for two years.

DAVID M. SATZ, JR.
United States Attorney

By: /s/ Carolyn E. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Dated May 24, 1968]

ANSWER TO REQUEST FOR ADMISSIONS

TO: DAVID M. SATZ, JR., ESQ.
United States Attorney
Attorney for Plaintiff
Federal Building
Newark, New Jersey 07102

Defendant, GERALD PAGE, denies requests num bered 1, 2, 3 and 4 of the Request for Admissions served upon him upon the basis that the statements set forth therein are taken out of context and do not fully and accurately reflect the content of the statements which the defendant has admitted by not answering request for admissions #8.

/s/ Gerald Page
GERALD PAGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

[Filed April 30, 1969]

ANSWERS TO REQUESTS FOR ADMISSIONS

TO: UNITED STATES ATTORNEY
Federal Building
Newark, New Jersey

The defendant Philip L. Bornstein, hereby forwards answers to Request for Admissions in the above matter:

1. Defendant has no recollection of paragraph 1.
2. Defendant admits paragraph 2.
3. Defendant Philip L. Bornstein admits the entry of a plea of guilty to Count II of an indictment, but said defendant denies the factual allegations as enumerated in the Request for Admissions.
4. The copy of the Request for Admissions in the hands of defendant is Nos. 1, 2, 3 and 7. Defendant has not been served Request Nos. 4, 5 and 6.

/s/ Philip L. Bornstein
PHILIP L. BORNSTEIN

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1141-67

[Filed April 13, 1973]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the plaintiff, United States of America, and the defendants, Philip L. Bornstein and Gerald Page, that the following statements, which are true, and the documents listed in the Schedule A, attached hereto and made a part hereof, which are genuine copies of the originals, shall, without further proof being adduced, constitute all of the evidence in the above-entitled action, and that by so stipulating and agreeing the parties to this action do not waive any right to contest, argue, or advance, to this or any higher Court, the proposition that any or all such statements or documents are not, as a matter of law, relevant, pertinent or material to this action.

1. This is a civil action brought by the United States pursuant to the provisions of §§ 3490 and 5438 of the Revised Statutes, 12 Stat. 696, Title 31 U.S.C. §§ 231, 233, to recover the forfeitures and double damages provided by § 3490. This Court has jurisdiction of this action by virtue of § 3491 of the Revised Statutes, 31 U.S.C. 232, as amended.

2. At all times hereinafter mentioned, defendant United National Labs, Division of Sonora Electromatics, Inc. (hereafter United) was and is a corporation of the State of New Jersey with principal offices of business at No. 295 Vreeland Avenue, Paterson, New Jersey, was engaged in the business of buying and selling electron tubes, and is within the jurisdiction af this Court.

3. At all times hereinafter mentioned, defendant Philip L. Bornstein was part owner and General Manager of United and defendant Gerald Page was part owner, Vice-President and Manager of Sales of defendant United. Defendant United was operated and managed by defendants Philip L. Bornstein and Gerald Page. Defendant Philip L. Bornstein resides at No. 51 Spottswood Road, Glen Rock, New Jersey, and is within the jurisdiction of this Court. Defendant Gerald Page resides at No. 140 Dean Street, Glen Rock, New Jersey, and is within the jurisdiction of this Court.

4. None of the defendants were in the military or naval forces of the United States, or in the militia or called into or actually employed in the service of the United States, during the times involved in this action.

5. At all times hereinafter stated Model Engineering and Manufacturing Corp., Inc. (hereafter Model), was and is an Indiana corporation, with principal offices at Huntington, Indiana, engaged in the business of manufacturing and building electronic radio equipment and radio sets.

6. At all times hereinafter stated the United States Army Signal Supply Agency and the Chicago Procurement District were divisions of the Department of the Army, an agency and instrumentality of the plaintiff, vested with the responsibility for the procurement of electronic equipment and parts for the Department of the Army, as authorized by 10 U.S.C. 2304 (public law 1028, 84th Congress).

7. By Supply Contract No. DA-36-039-AMC-01080(E), (hereafter Contract, Exhibit G-22 herein) dated August 29, 1962, between the United States Signal Supply Agency and Model, Model undertook to manufacture for and supply to the Department of the Army Radio Kit Sets, each of which was to contain the following sub-items: A radio transmitter kit, a radio receiver kit, a power supply kit, a radio transformer kit, and a radio accessory kit. The total dollar volume of the contract and its supplements was $2,096,583.08.

The component parts list of this contract specified that Sub-item #1-5-33, to be included in the radio accessory kits, called for:

> "2 ea. Tube, Electron JAN type 4X150G Per Specifications, MIL. E-1 and TSS MIL. E-1, 302 E dated 4/17/57"

The Specifications pertinent to JAN type tube 4X150G provided as follows:

3.7.1.1 "JAN" prefix. The designation of all tubes procured under this specification shall bear the prefix "JAN" except that in the case of small tubes (T-6 ½ bulb outline or smaller) the prefix "J" shall be used. Tubes procured under a contract which either permits or requires any changes in any of the conditions or requirements of this specification shall not bear the prefix "JAN" nor any abbreviation thereof. The "JAN" brand is registered under number 504860 by the United States Patent Office and shall be used only on tubes which have passed Government inspection.

3.7.1.2 Qualification code. The qualification code marking follows the "JAN" prefix. This designation is assigned to the manufacturer for use on all tube types of his manufacture which have passed the qualification tests and have been approved for inclusion on the Qualified Products List. The code-designating letters shall be as listed in Publication NAVSHIPS 900,152. The code-designation shall be used only by the manufacturer to whom it has been assigned and only as a part of the designation on tubes manufactured at the plant to which the qualification approval was granted. In the case of small tubes (see 3.7.1.1), the manufacturer's code designation may be abbreviated by deleting "C" (the indication that the code has been assigned to a commercial organization in the United States or Canada).

3.7.1.2.1 Tubes not having qualification. Tubes procured under this specification from a source of supply for which no qualification approval has been granted, shall be marked "JAN" followed by the type on the side wall of the base, or on the envelope of metal, loc-in tubes, or other glass tubes, or on the bulb of tubes without bases. The prefix "J", abbreviation for "JAN", shall be used only as specified in 3.7.1.1. The manufacturer's code name which signifies qualification shall not be used on any part of the tube.

8. The JAN 4X150G electron tubes are not manufactured for commercial use; they are manufactured

only for military equipment. Surplus or obsolete 4X150G electron tubes which contain the "JAN" designation and which were originally manufactured for military equipment, can be used commercially.

9. The only authorized manufacturer of the 4X150G electron "JAN" tube during all times referred to in the Complaint and from 1957 to 1964 was Eitel McCullough, Incorporated, of San Carlos, California (hereafter Eimac). The "JAN" designation on the tubes which can only be placed thereon by the manufacturer after they have passed Government source inspection, is an abbreviation for the *J*oint *A*rmy *N*avy qualification approval standard registered by the United States Patent Office (Exhibit G-24 herein). A tube with "JAN" designation indicates it has been inspected and approved by the United States Government at the source (place) of manufacture, during the manufacturing process.

10. Model, as contractor, made the following certification in the Contract:

> "The offeror/contractor certifies that the material offered is new, recently manufactured, has never been used and is not former surplus of any type."

11. Due to the requirements of the equipment specifications and complete "JAN" tests, as required by the "JAN" specifications, the use of a commercial tube which is non-"JAN" branded, or a surplus or obsolete 4X150G tube bearing the "JAN" brand designation, required prior written approval from the Government Contracting Officer administering the Contract. No such approval had been given to Model.

12. In 1963, defendants Philip L. Bornstein and Gerald Page, acting through defendant United, offered to sell electron tube type 4X150G to Model, which were required by Model under the Contract, and Model ordered 120 JAN 4X150G electron tubes from defendants.

13. In December 1963, two shipments of 4X150G tubes, 120 in number, were sent by the defendants to Model, but did not have "JAN" stamped on the tubes which indicated to Model that the tubes were not source inspected as called for under the Contract. Model re-

turned them to the defendants because they were not source inspected nor properly stamped.

14. Model became concerned that United might not be able to furnish the required tubes which met the specifications of the contract and asked that United confirm in writing that proper tubes could be furnished.

15. By letter dated January 24, 1964, signed by defendant Philip L. Bornstein, Vice-President, United National Labs, Model was advised as follows:

> "This letter is to stand as affirmation by us that we are fully equipped and capable to delivery (sic) any and all electron tubes and semi-conductors on which we accept purchase orders from you to the applicable military specifications and government source inspection supplied as required."

16. (a) Inherent in the "JAN" concept is a system of testing procedures, developed by the Government, which a manufacturer of electronic equipment for Government use, as well as the product he manufactures, must continuously undergo. Under this system, the Government is assured of the capability, reliability and interchangeability of electronic equipment produced for its use in Military Equipment.

(b) In order for a manufacturer of electronic equipment to *qualify* to produce "JAN" branded electron tubes, he must first pass the following four qualifying tests conducted by the Government during the Qualifying Testing period:

1. *Environmental Testing*—Manufacturer must demonstrate that he can control the environment of his plant for electronic equipment production;

2. *Design Testing*—Manufacturer must demonstrate that he has the engineering capability to develop and produce high quality electronic equipment, and develop and produce engineering changes, when needed;

3. *Production Testing*—Manufacturer must demonstrate his capability to continue to produce, over a sustained period of time, the electronic equipment; and

4. *Life Testing*—Manufacturer must demonstrate that the electronic equipment manufactured by him can continually perform for the period of time required in Government Specifications. In the case of electron tubes, such manufacturer must demonstrate that it will perform for at least 500 hours.

(c) After passing the Qualifying Tests, the manufacturer becomes qualified to manufacture the electronic equipment concerned as "JAN" branded. In the case of electron tubes, the tube type he produces is listed in the Government's Qualified Products List, and he is assigned a Qualification code, also listed in the Qualified Products List, which designates him as the Qualified Manufacturer of the particular electron tube.

(d) Thereafter, all electron tubes to be "JAN" branded by the Qualified Manufacturer must continuously undergo production, life, and design testing during the manufacturing process. The life test is performed on a sample basis since this test destroys the tube. The production test, part of MIL-E-1, could physically be performed by an independent laboratory.

(e) To assure that electron tubes made by the Qualified Manufacturer are so tested, Government Source Inspectors are present at the Qualified Manufacturers plant, in either a resident or visiting capacity, to conduct the tests while the electron tubes are being produced.

(f) Only after the electron tubes pass all of the tests —design, life, production—can the Qualified Manufacturer imprint the "JAN" designation, followed by his Qualification Code designation symbol, on them.

(g) During these imprinting procedures, an acceptance code date, a four digit number, which must coincide with the year and week of manufacture, is affixed to the electron tube. For example, the acceptance code date 6318 indicates that the electron tube was "JAN" inspected in the 18th week of the year 1963.

(h) As proof of Government Source Inspection of such "JAN" branded electron tubes, the Government In-

spector imprints his "Eagle" acceptance stamp on the packing slips accompanying the shipment of the tubes, *and* under a written certification that the tubes have been source inspected and have passed all of the required tests, affixes his signature.

(i) Because of the testing requirements, "JAN" branded electron tubes are produced only when a specific order is placed therefor. They are never stocked or kept on the shelf.

(j) Under the JAN system as a matter of policy, tubes more than one year old are not JAN tested at the point of manufacture.

(k) Genuine "JAN" branded electron tubes can be sold only to the Government or for Government use. They can be sold either directly to the Government or to someone who has a Government Contract calling for their use. They are not sold to tube distributors.

(l) The Qualification code assigned to Eimac for use on all tube types of its manufacture which have passed the qualification tests and have been approved for inclusion on the Qualified Products List was and continues to be: CIM.

(m) Eimac's qualification code—CIM—could only be used by Eimac on electron tubes manufactured at the plant to which qualification approval to produce such electron tubes was granted. An electronic tube "JAN" branded by Eimac would be marked thusly: "JAN-CIM".

(n) Eimac engraved serial numbers on all 4X150G electron tubes it manufactured. Inherent in the prefix of each tube serial number, the first two digits, is Eimac's internal date-code system from which the year and month of the manufacture of each electron tube is readily determined.

(o) The serial number code-date prefix is a combination of one letter of the alphabet and one number. The letter of the alphabet designates the month and the number designates the year.

The first 12 letters of the alphabet, A through L, inclusive, were assigned to January to December, inclusive. The letter A designates January, the letter B, February, the letter C, March, and so forth.

The last digit of each calendar year, numbers 0 through 9, inclusive, is the other digit of the tube serial number date-code prefix.

(p) During the years 1950-1960, inclusive, Eimac's date-code prefix was a letter of the alphabet followed by a number. For example, a serial number prefixed A0 indicates that the electron tube was manufactured in January, 1960. A serial number prefixed L9 indicates that the electron tube was manufactured in December, 1959.

During the years 1960-1970, inclusive, Eimac's date-code prefix was a number followed by a letter of the alphabet. For example, a serial number prefixed 1B indicates that the electron tube was manufactured in February, 1961. A serial number prefixed 2C indicates that the electron tube was manufactured in March, 1962.

17. (a) On April 30, 1963, Arthur H. Richardson, Inc., a distributor of electron tubes and franchised distributor of Eitel McCullough, Inc. (Eimac), purchased 451 4X150G tubes, which had been placed in termination inventory due to a design change and which had never been used, for $15.52 per tube which was their market price (Exhibit G-44, herein).

(b) In 1963, non obsolete JAN 4X150G tubes had a market price of $40 per tube.

(c) On May 10, 1963, Gerald Page wrote to Model advising that United was capable of supplying 945 JAN 4X150G electron tubes for $32 per tube (Exhibit G-33, herein).

(d) In July, 1963, the defendants purchased 10 4X 150G tubes from Arthur H. Richardson, Inc. and shipped them to Model for sampling. In September, 1963, Model sent a form to United which advised them of the following facts concerning the 10 4X150G tubes preliminary inspection:

no code date

no JAN marking

electrically OK

physically OK

Decision: accepted

(e) On December 26, 1963, Model issued to United a Purchase Order for 1008 JAN 4X150G electron tubes for $32,256 or $32 per tube which called for a regular monthly delivery of tubes (Exhibit G-26(c), herein).

(f) The defendants knew that the 4X150G tubes they would sell to Model were for use in the Contract, although they never saw a copy of the Contract.

(g) In December 1963, the defendants shipped 120 4X150G electron tubes to Model and in early January, 1964, Model returned the tubes as unacceptable because they were not JAN tubes and had not been government source inspected.

(h) On January 24, 1964, Philip Bornstein wrote to Model and advised that United was capable of delivering all tubes under Model's Purchase Orders which meet the applicable military specifications and government source inspection as required (see paragraph 15 above).

(i) United purchased 380 of the aforesaid 451 4X 150G tubes from Arthur H. Richardson, Inc. for $17.50 per tube under the following invoices, prior to the sale by United to Model:

(1) Invoice 10149 dated 1/4/64 covering 125 tubes (Exhibit G-27(a) herein);
(2) Invoice 10397 dated 2/17/64 covering 150 tubes (Exhibit G-27(b) herein);
(3) Invoice 10506 dated 3/6/64 covering 103 tubes (Exhibit G-27(c) herein); and
(4) Invoice 09950 dated 11/23/63 covering 2 tubes (Exhibit G-27(d) herein).

(j) The defendants then affixed or caused to be affixed to the 4X150G tubes which they had in their possession in January 1964 and which they acquired from Arthur H. Richardson, Inc., the following markings:

(1) The JAN designation;
(2) The Manufacturer's Qualification Code (CIM); and

(3) The acceptance date (6318),

which the defendants knew were false and inaccurate.

(k) From January to March 1964, the defendants shipped falsely JAN branded 4X150G tubes to Saxon Laboratories, Inc. in New York for a MIL/E 1 electrical test, which was performed; the tubes were found operable.

(l) Before shipping any of the JAN branded 4X150G tubes which had been tested at Saxon Laboratories, Inc., the impression of a facsimile of a Government Inspector's "Eagle" stamp was affixed on each of the packing lists (G-1 - G-21) at Saxon Laboratories, Inc., by a person or persons other than Philip L. Bornstein or Gerald Page.

(m) Model paid $32 for each 4X150G tube it received from United.

(n) The United States removed 442 4X150G electron tubes from the radio kits it purchased from Model, each of which contained:

(1) A false JAN designation;
(2) A false Manufacturer's Qualification Code (CIM); and
(3) A false acceptance date (6318).

(o) The cost to the United States in replacing the 442 falsely marked 4X150G electron tubes was $40.82 per tube or a total of $18,042.44 which is subject to proof by affidavit or voucher.

(p) On May 20 and 27, 1966, Gerald Page and Philip Bornstein, respectively, plead guilty to Count II of an Indictment which included two overt acts (Exhibits G-36, G-35, and G-34, herein).

(q) In November, 1966, Model paid the United States $18,000 for the Government's claim relating to the payment of the 442 falsely branded JAN 4X150G tubes which are referred to in the Complaint.

18. Model accepted shipments of the 4X150G electron tubes from the defendants, under the defendants' certification referred to in paragraph 23. Accompanying the shipments of tubes were the following packing lists, which identified each tube shipped therewith by serial number, and designated each such tube as "JAN";

PACKING LISTS	DATE	QUANTITY
A 11351	1/27/64	20
A 11356	1/29/64	18
A 11357	1/29/64	6
A 11355	1/29/64	18
A 11354	1/29/64	18
A 11363	1/30/64	20
A 11364	1/30/64	20
A 11362	1/30/64	20
A 11361	1/30/64	20
A 11360	1/30/64	20
A 11372	2/ 4/64	13
A 11371	2/ 5/64	17
A 11370	2/ 5/64	20
A 11369	2/ 5 64	18
A 12263	2/18/64	20
A 12268	2/18/64	20
A 12262	2/18/64	20
A 12265	2/18/64	20
A 12264	2/18/64	29
A 12260	2/18/64	20
A 12261	2/18/64	20

Each of these packing lists contains the following reference:

"Gov. Contract No.: DA 36-039-AMC-1080 E", and bears the impression of a facsimile of a Government Inspector's "Eagle" stamp. These packing lists did not contain the certification and signature referred to in paragraph 16(h) when they were received at Model.

The packing lists G-1 through G-21 referred to above do not reflect separate shipments of the tubes listed thereon, but rather reflect separate boxes which were combined for a total of three shipments to Model. The defendants billed Model for the tubes listed in Exhibits G-1 through G-21 on three separate invoices and charged $32 per tube.

19. The defendants knew that the 4X150G electron tubes were to be used by Model in a Government Contract.

20. The electron tubes mentioned in paragraph 17 above, together with Richardson Invoices and defendants' packing lists, issued to Model, containing their serial numbers, are Exhibits G-1a through G-21t, inclusive, herein.

21. The United States received 684 4X150G tubes from Model under the Contract. 442 of these tubes were improperly JAN branded as described in paragraph 17 (n). 397 of these improperly JAN branded tubes are identified by serial number as having come from the defendants. The serial numbers of the remaining 45 improperly JAN branded tubes are unknown and cannot be directly traced to the defendants.

22. In addition to the packing lists set forth in paragraph 18 above, Packing List A 11073, Exhibit G-45 herein, for 60 JAN 4X150G electron tubes, at $32.00 per tube was found in the possession of Model in July 1964. Exhibit G-45 does not reference the Contract number, does not bear the signature of a Government Source Inspector, and does not refer to any tubes by serial number.

23. With each shipment of 4X150G electron tubes to Model, defendants issued, to Model, a "Certificate of Compliance". Said "Certificate of Compliance" was signed: "Gerald Page, Vice-President, United National Labs", and read as follows:

"It is hereby certified that all materials used in the manufacture of parts in the quantity called for on the subject purchase order received by Model Engineering and Mfg. Corp. conform to the material and/or manufacturing specifications as called for on said purchase order.

Physical, Electrical, and/or Chemical test reports are on file with us or with our suppliers for examination and indicate conformance with applicable specification requirements."

24. Model submitted to the United States 35 claims for payment under the Contract which were designated as invoices. Each of the 35 invoices of Model included claims for payment for JAN 4X150G tubes which had been "JAN" branded by the defendants. The 35 invoices covered payment for the entire contract and the United States paid Model's 35 invoices with eight Government Vouchers (Exhibit G-23(a) through (h)). The defendants did not prepare any of the above-mentioned documents, or have knowledge of the manner in which the claims of Model were presented.

25. The answers submitted by the United States to defendant Page's interrogatories are true, and annexed hereto are copies of Interrogatories Nos. 20, 21, 22, 23, Supplemental Interrogatories Nos. 1-4 and all the Government's answers thereto, together with a letter dated April 19, 1971 from United States Attorney to Jack Ballan, Esq.

26. The United States claims that the defendants are jointly and severally liable for 38 forfeitures, pursuant to 31 U.S.C. § 231 *et seq.* computed as follows:

(a)	35 Model invoices submitted to the United States each of which incorporated claims for payment for falsely branded JAN 4X150G tubes supplied by the defendants	35
(b)	False branding of 442 4X150G tubes by the defendants	1
(c)	Affixing an impression of a facsimile of a Government Source Inspectors Stamp to 21 packing lists	1
(d)	The issuance of 21 false Certificates of Compliance with each shipment	1
		38

WILLIAM ROSSMOORE, ESQ.
Attorney for Defendant,
Gerald Page

/s/ William Rossmoore
WILLIAM ROSSMOORE

JACK BALLAN, ESQ.
Attorney for Defendant,
Philip L. Bornstein

/s/ Jack Ballan
JACK BALLAN

HERBERT J. STERN
United States Attorney
Attorney for Plaintiff,
United States of America

BY: /s/ Carolyn E. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

BY: /s/ William A. Carpenter, Jr.
WILLIAM E. CARPENTER, JR.
Assistant U.S. Attorney

April 19, 1971

Jack Ballan, Esquire
14 - 25 Plaza Road
Fair Lawn, New Jersey 07410

Re: United States vs. Philip L. Bornstein, et als., Civil Action No. 1141-67

Dear Mr. Ballan:

Reference is made to your letter dated April 15, 1971. Please be advised that by deleting item No. 49, page h, from the Government trial memorandum, the Government is *not* acknowledging that it suffered no actual financial loss. The same was deleted because, as a matter of fact, the tubes were not replaced, but retained in storage at the various depots to which the radio sets in which they were included were shipped.

Since the Government actually paid Model the full contract price for the radio sets of which the tubes complained of were a component part, so much of the total payment to Model that is allocable to those components of the sets, which did not meet the specifications, to wit, 442 tubes, at $40.82, or $18,042.44, is the amount of the *single* damages claimed. See *Faulk v. United States*, 198 F.2d 169 (5th Cir. 1952), cited at page 28 of the Government's trial memorandum.

Thus, it is the Government's contention that since it paid for 442 tubes which did not meet its specifications and for which it would not have paid but for the fraud of the defendants the Government is entitled to recover double the amount of the single damages, or $36,084.88. Stated simply the Government was caused, by the defendants' fraud to pay for surplus tubes which did not

meet the contract specifications, for which it had no use, and which it did not order.

Very truly yours,

HERBERT J. STERN
United States Attorney

By: CAROLYN E. ARCH
Assistant U.S. Attorney

cc: Honorable Robert Shaw
Judge, United States District Court
Post Office Building
Newark, New Jersey

William Rossmoore, Esq.
c/o Stavis, Richardson,
Koenigsberg & Rossmoore, Esqs.
744 Broad Street
Newark, New Jersey 07102

20. As to each and every tube alleged to be defective in Paragraph 17 of the complaint, state whether or not any tests were performed by anyone on any of said tubes and if the answer is in the affirmative, state the time, date, and place that each such test was performed, the name and address of the person making each such test, and set forth in detail the nature of the test performed and the results thereof.

20. *ANSWER*: Immediately prior to 1 July 1964, inspectors at Tobyhanna Army Depot, Lexington-Blue Grass Army Depot and Sacramento Army Depot withdrew tubes purporting to be JAN 4X 150G from shipments received from Model. The tube serial numbers were then referred to Eitel-McCullough, the authorized manufacturer, to determine if they were genuine JAN tubes and of recent manufacture. This firm, on 17 July 1964, reported results of a search of their records against the serial numbers furnished, which in brief showed that the quantity alleged were not in fact genuine JAN tubes. The inspector who withdrew the tubes and recorded the serial numbers at Tobyhanna Army Depot was Gabriel P. Unis, whose present address is reported to be 3852 Sinclair Lane, Baltimore, Maryland 21213. Those who did the same at Lexington-Blue Grass Army Depot were:

Roy S. Harney, Sr.
744 Berry Lane
Lexington, Kentucky 40502

James A. Brown
2905 Southview
Lexington, Kentucky 40502

Personnel participating in the same effort at Sacramento Army Depot were:

James F. Van Wicklin
8236 Citidel Way
Sacramento, California 95826

John F. Buechner
3120 Adams Road
Sacramento, California 95825

Richard L. Traux
8984 Rosetta Circle
Sacramento, Calif. 95826

Joseph S. Starzec
6271 Greenhaven Drive
Sacramento, Calif. 95831

Edward S. Hamakawa
1725 Sherwood Avenue
Sacramento, Calif. 95822

John E. Russell
1062 56th Street
Sacramento, Calif. 95819

Joseph A. Gilmette (No longer employed by Sacramento Army Depot) Address unknown

Eitel-McCullough, now a Division of Varian, reported that the following personnel checked their records for the purpose indicated:

Mr. I. H. Encoyand
DCASR-San Francisco
866 Malcolm Road
Burlingame, California 94010

Mr. John D. Quackenbush
540 Summit Spring Road
Woodside, California 94062

Mr. Carl M. Miloslavich
309 De Anza Avenue
San Carlos 94070

21. As to each and every tube alleged to be defective in Paragraph 17 of the complaint, state in detail the nature of the said defect and describe in detail how the said defect was determined, giving the name and address of each person who as-

certained the said defect and the time, date, and place when the said defect was ascertained.

ANSWER: See answer to question 20.

22. Set forth in detail the basis on which it is claimed that the plaintiff was damaged in the amount of $40.82 for each defective tube, as alleged in Paragraph 21 of the complaint.

ANSWER: The basis for the claim is fully set forth in Paragraph 21 of the complaint. Due to the acts of the defendants in dealing with Model, the Government did not receive 442 tubes specified in the contract and is entitled to the value thereof at $40.82 each.

23. As to each and every defective tube as alleged in the complaint, state what disposition was made of the same from the time of the receipt of the same by Model to the present and as to each and every such tube state the present physical whereabouts of the same or the time, date, and place of the last known physical whereabouts of the same.

ANSWER: The tubes taken from Model shipments and found not to be genuine, were ordered to be segregated and held in storage at the following Army depots: Tobyhanna, Tobyhanna, Pa.; Lexington-Blue Grass, Lexington, Kentucky; and Sacramento, Sacramento, Calif. They are presently in storage at the points indicated.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP L. BORNSTEIN, GERALD PAGE, AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTROMATICS, INC., DEFENDANTS

SUPPLEMENTAL INTERROGATORIES

TO: DAVID M. SATZ, JR., ESQ.
United States Attorney
Attorney for Plaintiff
Federal Building
Newark, New Jersey 07102

SIR:

PLEASE TAKE NOTICE that the defendant, Gerald Page requires of the plaintiff answers under oath to the following supplemental interrogatories within the time prescribed by law:

1. As to each and every tube alleged to be defective in paragraph 17 of the complaint, state whether or not the plaintiff claims that any such tube had physical, electronic, performance, or similar characteristics or functions different from those required to be delivered to it under its contract with Model Engineering and Manufacturing Company, and if so, list each such tube, describe in detail the nature of the difference and give the date, place and name and address of any person performing any tests disclosing such differences.

The plaintiff herein does not claim that each tube was defective by reason of different physical, electronic, performance or similar characteristics from those required to be delivered to it under its contract with Model

Engineering and Manufacturing Company. The claim is based upon the facts that the required tubes had to be of recent manufacture, not surplus of any type, inspected at the source by a Government inspector, conform to all material and manufacturing specifications, and bear a genuine Government stamp indicating compliance with all requirements of prior testing and acceptance as genuine "JAN" tubes.

It was ascertained at the points where Model made delivery of its completed products, through various media by qualified persons, and by comparison of the serial numbers of the tubes furnished with the records of the original manufacturer, as fully detailed in the answer to question 20 of the prior interrogatory, that the tubes furnished were manufacturer's surplus, not of recent manufacture, did not conform to the required specifications, and did not bear the genuine stamp indicating that they had been Government inspected at the source. Details of the manner in which the furnished tubes were made to simulate the genuine, specified product are fully outlined in the statement given by defendant Gerald Page to the FBI originally and subsequently admitted by said defendant in this current action.

As indicated previously, the names of persons who made the tests, their addresses, the places at which tests were made and required searches for the Government are fully disclosed in the answer to question 20, of the prior interrogatory.

ANSWER TO SUPPLEMENTAL INTERROGATORY NO. 1.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP L. BORNSTEIN, GERALD PAGE, AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTROMATICS, INC., DEFENDANTS

SUPPLEMENTAL ANSWER TO INTERROGATORIES

TO: STAVIS, RICHARDSON, KOENIGSBERG and ROSSMORE, ESQ.
Attorneys for Defendant Gerald Page
744 Broad Street
Newark, New Jersey

SIRS:

The Plaintiff, United States of America, hereby supplements its answers to interrogatories as follows:

A. With respect to the meaning intended by Plaintiff in its characterization of tubes as "defective" and "obsolete":

ANSWER

Please refer to Plaintiff's answer to supplemental interrogatory No. 1 of Defendant Gerald Page, filed and served on March 21, 1969, wherein Plaintiff sets forth in detail its meaning of defective and obsolete tubes.

The plaintiff, United States of America, hereby answers supplemental interrogatory No. 2 as follows:

2. As to each tube taken from Model shipments as alleged in the answer to original interrogatory #23, state whether or not such tube was replaced, and if so, the date of replacement, the source of the replacement,

giving the name and address of the supplier thereof, and the consideration, if any, paid therefore and the name and address of the person to whom such consideration was paid.

2. Answer: None of the tubes taken from Model shipments as set forth in answer to original interrogatory No. 23 were replaced.

3. State whether or not any claim has been made by the plaintiff against Model Engineering and Manufacturing Company for the tubes alleged to be defective, and if so, state in detail the disposition of such claim.

Claim was made against Model Engineering and Manufacturing Company for the tubes alleged to be defective. The attached Exhibits #1, 2, 3, 4 and 5, state in detail the disposition of the claim.

4. State whether the plaintiff has received any payment or other consideration from Model Engineering for the tubes alleged in the complaint to be defective and if so, state the nature or amount of such consideration and the dates of payment thereof.

The plaintiff received the sum of $18,000.00 from Model Engineering in the form of a deduction from Model invoices, per voucher #121073, 13 December 1966, in accordance with Exhibits listed under Answer #3, and copy of voucher attached hereto marked Exhibit #6. Answered March 21, 1969

STAVIS, RICHARDSON, KOENIGSBERG
& ROSSMOORE
Attorneys for Defendant, Page

By /s/ William Rossmoore
WILLIAM ROSSMOORE

DAVID M. SATZ, JR.
United States Attorney

By: /s/ Carolyn E. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

DATED: August 22, 1968.

EXHIBIT #1

MEMCOR INC.
Huntington, Indiana 46750
Telephone 219—356-4300

1 December 1966

U.S. Army Electronics Command
225 South 18th Street
Philadelphia, Pennsylvania 19103

Attention: Mr. Lewis B. Moyer
Contracting Officer

Subject: Contract DA-36-039-AMC-01080(E)
P.O. 15263-PP-63-A1-51 (OA-1387 GRC Radio Sets) USAECOM Payment Withholding of MEMCOR Invoices Totalling $28,317.20.

Reference: 1) MEMCOR Letter (C. Horvath) dated 31 May 1966 to USAECOM (Mr. L. B. Moyer).
2) USAECOM Letter AMSEL-PP/P-CP-E3 (Mr. L. B. Moyer) dated 9 June 1966 to MEMCOR (Mr. C. Horvath)
3) MEMCOR Letter (C. Horvath) dated 19 August 1966 to USAECOM (Mr. L. B. Moyer).

Gentlemen:

Confirming a telephone conversation between Mr. L.B. Moyer, USAECOM and Mr. C. Horvath, MEMCOR, Inc., on 1 December 1966, enclosed are two (2) copies of a letter dated 23 November 1966 from the United States Department of Justice accepting MEMCOR's proposal in the amount of $18,000.00 in settlement of the Government's claim relative to the subject contract.

As discussed with Mr. Moyer, there now remains payment to MEMCOR in the sum of $10,317.20 under the terms of the settlement thereby completing all required contractual actions under the contract.

MEMCOR is presently experiencing a shortage of working capital and your assistance in expediting early payment of these monies is sincerely appreciated.

Please advise should further action be required by MEMCOR to assist you in your efforts.

Very truly yours,

/s/ C. Horvath
C. HORVATH
Director of Contracts

cc: C.W. Payne, A.C.O.
c/o MEMCOR, Inc.

EXHIBIT #2

November 3, 1966

United States Attorney
Federal Building
Fort Wayne, Indiana

Sir:

Re: Model Engineering & Manufacturing Co.
(Memcor, Incorporated)

In behalf of the above captioned client, we offer the sum of Eighteen Thousand ($18,000.00) Dollars in full settlement for the Government claim as reported to you in our telephone conversation of which this is in confirmation.

Respectfully,

CAMPBELL & LEMASTER
ALEXANDER CAMPBELL

AC/tk

c.c. Hon. Frederick Curloy
Fraud Section
U.S. Department of Justice
Washington, D.C.

[See letter dated 11-23-66]

EXHIBIT #3

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

[Emblem]

Nov. 23, 1966

Address Reply to the
Division Indicated
& Refer to Initials and Number

SS:DJTItus:jcp
46-26S-217

Alexander M. Campbell, Esquire
Campbell and LeMaster
Lincoln Tower
Fort Wayne, Indiana 46802

Re: Model Engineering and Manufacturing
Corporation, now known as Memcor, Inc.

Dear Mr. Campbell:

This has reference to your letters of November 3, 1966 and November 14, 1966, addressed to Mr. Alfred W. Moellering, United States Attorney, Fort Wayne, Indiana, copies of which you furnished to us, submitting an offer in the sum of $18,000 on behalf of Model Engineering and Manufacturing Company, Huntington, Indiana, now known as Memcor, Inc., in settlement of the Government's claim against that firm. The proposal contemplates that payment of the compromise amount will be made by a setoff against other funds now being withheld from your client by the Department of the Army under other contracts.

Our claim against Model arose through the failure of that company to furnish electron tubes type 4X150G to the Government in accordance with the specifications set forth in Contract No. DA-36-039-AMC-01080 (E) dated August 29, 1962, awarded by the United States Army

Signal Supply Agency, Philadelphia, Pennsylvania. The damages were computed to total $18,042.44 based on the receipt by the Department of the Army of 442 non-conforming and surplus tubes.

We accept your offer. Accordingly, we are by letter of even date so notifying the Department of the Army and requesting that it deduct the amount of the proposal from the funds now being withheld from your client.

The United States Attorney, Fort Wayne, Indiana, through his receipt of a copy of this letter, is hereby authorized to close his file in the matter.

Yours very truly,

BAREFOOT SANDERS
Assistant Attorney General
Civil Division

By: /s/ Frederick N. Curley
FREDERICK N. CURLEY
Chief, Frauds Section

cc: Mr. Alfred Moellering
United States Attorney
Fort Wayne, Indiana 46801

Department of the Army
Washington, D. C. 20310
Att: Judge Advocate General

EXHIBIT #4

November 14, 1966

Hon. Alfred W. Moellering
U.S. Attorney
Federal Building
Fort Wayne, Indiana

Re: U.S. Army Contract
D A 36-039-AMC 01188-(E)
O-A 1387/GRC
Radio Set Group, Vacuum Tube

Sir:

The U.S. Army is hereby authorized to deduct Eighteen Thousand ($18,000.00) Dollars from the approximate Twenty Eight Thousand ($28,000.00) Dollars now being held by the U.S. Army under the above subject contract.

Respectfully,

CAMPBELL & LEMASTER

ALEXANDER CAMPBELL
Counsel for MEMCOR, INC.
(Model Engineering &
Manufacturing Co.)

AC/tk

c.c. Hon. Fred Curley
Colonel Orin Jones
George Manis, President
Memcor, Inc.

EXHIBIT #5

NNNNEZCZCMLD301RTTU JAW RUEONFA0631
3362136-UUUU-RUEOAMA.
ZUR UUUUU
N 022131Z DEC 66
FM CG USAMC WASH DC
TO CG USA ELECTRONICS COMMAND FT MONMOUTH NJ

BT
[Illegible] AMC-48776. FR. AMCGC-S FOR CH COUNSEL

SUBJECT: MEMCOR, INC.

THE FOLLOWING IS THE TEXT OF DEPARTMENT OF JUSTICE LETTER DATED 23 NOVEMBER, 1966:

"THIS HAS REFERENCE TO YOUR LETTER OF NOVEMBER 10, 1966, RECOMMENDING ACCEPTANCE OF THE OFFER TOTALING $18,000 SUBMITTED IN COMPROMISE OF THE GOVERNMENT'S CLAIM AGAINST THE SUBJECT FIRM. THE PROPOSAL CONTEMPLATES THAT PAYMENT OF THE SETTLEMENT AMOUNT WILL BE MADE THROUGH A SETOFF AGAINST FUNDS IN THE SUM OF $28,317.20 NOW BEING WITHHELD BY YOUR DEPARTMENT FROM THE SUBJECT CONTRACTOR.

"PLEASE BE ADVISED THAT WE HAVE ACCEPTED THE TENDERED OFFER. ACCORDINGLY, IT WOULD BE APPRECIATED IF YOU WILL DEDUCT THE AMOUNT THEREOF FROM THE WITHHELD FUNDS AND NOTIFY US WHEN THIS SETOFF HAS BEEN MADE.

"THE UNITED STATES ATTORNEY, FORT WAYNE, INDIANA, IS BEING AUTHORIZED TO CLOSE HIS FILE SO FAR AS CONCERNS THE GOVERN-

PAGE 2 RUEOHFA6631 UNCLAS
MENT'S CLAIM AGAINST THE MODEL FIRM."

2. IN VIEW OF THE PRECARIOUS FINANCIAL CONDITION OF SUBJECT CORPORATION REQUEST PROMPT COMPLIANCE WITH JUSTICE DEPARTMENT SETTLEMENT AS OUTLINED ABOVE AND REPLY BY TWX WHEN ACTION HAS BEEN TAKEN AS REQUESTED.

ET

NNNNR

C/1 Ansell-PP/P. (P-61) || L. Hoyer

Standard Form No. 1034
GAO 8000
1964-110-03

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

121073

U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION

DEPARTMENT OF THE ARMY
U. S. ARMY ELECTRONICS COMMAND
FINANCIAL MANAGEMENT AGENCY
225 South 18th St., Phila., Pa. 19103

DATE VOUCHER PREPARED: 12-12-66

CONTRACT NUMBER AND DATE: DA-36 039 AMC-01020(E)

REQUISITION NUMBER AND DATE:

VOUCHER NUMBER:

PAID BY
USAECOM
FIN. MGMT. AGCY
[redacted]
PHILA., PA.
SYMBOL 5064

DEC 13 1966

DATE INVOICE RECEIVED: 12-13-66

DISCOUNT TERMS: —

PAYEE'S ACCOUNT NUMBER: 3209

GOVERNMENT B/L NUMBER:

PAYEE'S NAME AND ADDRESS:
REMCOR INC - FOR DEPOSIT IN
SPECIAL BANK ACCOUNT - DEFENSE
SUPPLY AGENCY
MAIL TO — FIRST NATIONAL BANK OF CHICAGO
38 SOUTH DEARBORN STREET
CHICAGO ILLINOIS 60690

SHIPPED FROM | TO | WEIGHT

NUMBER AND DATE OF ORDER	DATE OF DELIVERY OR SERVICE	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	QUANTITY	UNIT PRICE: COST	UNIT PRICE: PER	AMOUNT: DOLLARS	AMOUNT: CTS. (1)
15263-	DP-63-	A1-51				28317	20
8-29-67		Less withholding Account Paid					
Mod 12		withheld on Title Item this					
		Contract - Officer did 5 Dec 1966				18000	00
		0 0					
	12-1-66						

(Use continuation sheet(s) if necessary) (Payee must NOT use the space below) TOTAL 10317 20

PAYMENT:
- ☐ COMPLETE
- ☐ PARTIAL
- ☑ FINAL
- ☐ PROGRESS
- ☐ ADVANCE

APPROVED FOR = $10317.20

EXCHANGE RATE = $1.00

BY [redacted]

TITLE

DIFFERENCES

Amount verified; correct for

(Signature or initials)

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

12-12-66 (Date) [redacted] (Authorized Certifying Officer) Voucher Examiner (Title)

ACCOUNTING CLASSIFICATION (Appropriation symbol must be shown; other classification optional)

21X2030 262-7520 [illegible] 10317.20

[illegible] 606 00 211 02660

PAID BY

CHECK NUMBER ON TREASURER OF THE UNITED STATES

CASH DATE

$

CHECK NUMBER ON (Name of bank)

PAYEE [redacted]

PER

TITLE

1 When stated in foreign currency, insert name of currency
2 If the ability to certify and authority to approve are combined in one person, one signature only is necessary; otherwise the approving officer will sign in the space provided, over his official title.
3 When a voucher is receipted in the name of a company or corporation, the name of the person writing the company or corporate name, as well as the capacity in which he signs, must appear. For example: "John Doe Company, per John Smith, Secretary", or "Treasurer", as the case may be

☆ U S GOVERNMENT PRINTING OFFICE: 1963 — 689378

43

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BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

PHILIP L. BORNSTEIN, ET AL, DEFENDANTS

SCHEDULE A

GOVERNMENT'S LIST OF EXHIBITS

NO.	DESCRIPTION OF EXHIBIT
G-1	United Packing List No. A 11351
G-1(a)	Tube 4X150G—SN 1C-16972
G-1(b)	Tube 4X150G—SN 1B-38157
G-1(c)	Tube 4X150G—SN 1C-45676
G-1(d)	Tube 4X150G—SN 1C-20586
G-1(e)	Tube 4X150G—SN 1G-32008
G-1(f)	Tube 4X150G—SN 1C-37453
G-1(g)	Tube 4X150G—SN 1F-13259
G-1(h)	Tube 4X150G—SN 1C-21304
G-1(i)	Tube 4X150G—SN 1D-12571
G-1(j)	Tube 4X150G—SN ID-04460
G-1(k)	Tube 4X150G—SN 1F-22625
G-1(l)	Tube 4X150G—SN 1C-16977
G-1(m)	Tube 4X150G—SN 1C-28057
G-1(n)	Tube 4X150G—SN 1B-36135
G-1(o)	Tube 4X150G—SN 1D-04364
G-1(p)	Tube 4X150G—SN 1F-11142
G-1(q)	Tube 4X150G—SN 1D-04323
G-1(r)	Tube 4X150G—SN 1D-03999
G-1(s)	Tube 4X150G—SN 1C-13420
G-1(t)	Tube 4X150G—SN 1F-47216
G-2	United Packing List No. A 11354
G-2(a)	Tube 4X150G—SN 1A-09209

NO.	DESCRIPTION OF EXHIBIT
G-2(b)	Tube 4X150G—SN 1D-20008
G-2(c)	Tube 4X150G—SN 1H-05366
G-2(d)	Tube 4X150G—SN 1C-27970
G-2(e)	Tube 4X150G—SN BO-39921
G-2(f)	Tube 4X150G—SN 1I-59628
G-2(g)	Tube 4X150G—SN 1B-11125
G-2(h)	Tube 4X150G—SN 1D-04600
G-2(i)	Tube 4X150G—SN 1C-37490
G-2(j)	Tube 4X150G—SN 2B-27361
G-2(k)	Tube 4X150G—SN 1F-23746
G-2(l)	Tube 4X150G—SN 1F-36686
G-2(m)	Tube 4X150G—SN 1F-22929
G-2(n)	Tube 4X150G—SN 1C-22299
G-2(o)	Tube 4X150G—SN 1C-37585
G-2(p)	Tube 4X150G—SN J9-22904
G-2(q)	Tube 4X150G—SN 2I-09008
G-2(r)	Tube 4X150G—SN 2I-08307
G-3	United Packing List No. A 11355
G-3(a)	Tube 4X150G—SN L9-05282
G-3(b)	Tube 4X150G—SN 1B-10427
G-3(c)	Tube 4X150G—SN 1B-29512
G-3(d)	Tube 4X150G—SN 1C-29454
G-3(e)	Tube 4X150G—SN 1B-10565
G-3(f)	Tube 4X150G—SN 2C-32202
G-3(g)	Tube 4X150G—SN 2H-16724
G-3(h)	Tube 4X150G—SN BO-29203
G-3(i)	Tube 4X150G—SN 2G-24061
G-3(j)	Tube 4X150G—SN 1C-37830
G-3(k)	Tube 4X150G—SN 1F-04349
G-3(l)	Tube 4X150G—SN 1H-04767
G-3(m)	Tube 4X150G—SN 2I-07867
G-3(n)	Tube 4X150G—SN 1C-37516
G-3(o)	Tube 4X150G—SN 1C-10804
G-3(p)	Tube 4X150G—SN 2H-16976
G-3(q)	Tube 4X150G—SN 2I-16383
G-3(r)	Tube 4X150G—SN 2H-13895
G-4	United Packing List No. A 11356
G-4(a)	Tube 4X150G—SN 2I-13406

NO.	DESCRIPTION OF EXHIBIT
G-4(b)	Tube 4X150G—SN 17-15664
G-4(c)	Tube 4X150G—SN 2H-13682
G-4(d)	Tube 4X150G—SN BO-40069
G-4(e)	Tube 4X150G—SN DO-16655
G-4(f)	Tube 4X150G—SN 1J-12551
G-4(g)	Tube 4X150G—SN 1C-11282
G-4(h)	Tube 4X150G—SN 1C-28145
G-4(i)	Tube 4X150G—SN 2H-15202
G-4(j)	Tube 4X150G—SN 2F-13192
G-4(k)	Tube 4X150G—SN 1H-55380
G-4(l)	Tube 4X150G—SN DO-11641
G-4(m)	Tube 4X150G—SN 2I-08632
G-4(n)	Tube 4X150G—SN 2G-23679
G-4(o)	Tube 4X150G—SN L9-42428
G-4(p)	Tube 4X150G—SN 1A-10293
G-4(q)	Tube 4X150G—SN AO-22382
G-4(r)	Tube 4X150G—SN 2I-06542
G-5	United Packing List No. A 11357
G-5(a)	Tube 4X150G—SN 2I-22312
G-5(b)	Tube 4X150G—SN DO-23703
G-5(c)	P/L 11357 delineating tube 4X150G SN DO-23703
G-5(d)	P/L A 11357 delineating tube 4X150G SN KO-23979
G-5(e)	P/L A 11357 delineating tube 4X150G SN DO-0042
G-5(f)	Tube 4X150G—SN J9-16341
G-6	United Packing List No. 11356
G-6(a)	Tube 4X150G—SN L9-28972
G-6(b)	Tube 4X150G—SN 17-01524
G-6(c)	Tube 4X150G—SN L9-21255
G-6(d)	Tube 4X150G—SN 1C-29196
G-6(e)	Tube 4X150G—SN 1C-21216
G-6(f)	Tube 4X150G—SN 1B-38163
G-6(g)	Tube 4X150G—SN 1C-10824
G-6(h)	Tube 4X150G—SN 1C-29015
G-6(i)	Tube 4X150G—SN 1C-13748
G-6(j)	Tube 4X150G—SN 1C-28937
G-6(k)	Tube 4X150G—SN DO-16634
G-6(l)	Tube 4X150G—SN FO-19782
G-6(m)	Tube 4X150G—SN AO-16346

NO.	DESCRIPTION OF EXHIBIT
G-6(n)	Tube 4X150G—SN 1C-37552
G-6(o)	Tube 4X150G—SN 1C-37540
G-6(p)	Tube 4X150G—SN 1C-29186
G-6(q)	P/L delienating tube 4X150G—SN 1B-13067
G-6(r)	Tube 4X150G—SN 1C-10396
G-6(s)	Tube 4X150G—SN 1C-28941
G-6(t)	Tube 4X150G—SN 1C-13729
G-7	United Packing List No. A 11361
G-7(a)	Tube 4X150G—SN 1D-05022
G-7(b)	Tube 4X150G—SN 1C-18414
G-7(c)	Tube 4X150G—SN 1C-29347
G-7(d)	Tube 4X150G—SN 1E-29495
G-7(e)	Tube 4X150G—SN 1C-21543
G-7(f)	Tube 4X150G—SN 1B-10544
G-7(g)	Tube 4X150G—SN 1C-29529
G-7(h)	Tube 4X150G—SN 1C-37691
G-7(i)	Tube 4X150G—SN 1D-12617
G-7(j)	Tube 4X150G—SN 1C-29283
G-7(k)	Tube 4X150G—SN 1F-11522
G-7(l)	Tube 4X150G—SN 1C-11424
G-7(m)	Tube 4X150G—SN 1D-03180
G-7(n)	Tube 4X150G—SN 1H-07858
G-7(o)	Tube 4X150G—SN 1O-32253
G-7(p)	Tube 4X150G—SN 1C-29116
G-7(q)	Tube 4X150G—SN 1C-37862
G-7(r)	Tube 4X150G—SN 1C-29016
G-7(s)	Tube 4X150G—SN 1D-24781
G-7(t)	Tube 4X150G—SN 1C-37854
G-8	United Packing List No. A 11362
G-8(a)	Tube 4X150G—SN 1D-12220
G-8(b)	Tube 4X150G—SN 1C-37558
G-8(c)	Tube 4X150G—SN 1C-28985
G-8(d)	Tube 4X150G—SN 1C-29628
G-8(e)	Tube 4X150G—SN 1C-17185
G-8(f)	Tube 4X150G—SN EO-24488
G-8(g)	Tube 4X150G—SN L9-23934
G-8(h)	Tube 4X150G—SN 1E-12748
G-8(i)	Tube 4X150G—SN DO-11579

NO.	DESCRIPTION OF EXHIBIT
G-8(j)	Tube 4X150G—SN I7-09700
G-8(k)	Tube 4X150G—SN 1C-13442
G-8(l)	Tube 4X150G—SN 1C-13672
G-8(m)	Tube 4X150G—SN 1C-28062
G-8(n)	Tube 4X150G—SN 1C-17100
G-8(o)	Tube 4X150G—SN 1C-46707
G-8(p)	Tube 4X150G—SN FO-32384
G-8(q)	Tube 4X150G—SN I7-15753
G-8(r)	Tube 4X150G—SN K9-38084
G-8(s)	Tube 4X150G—SN K9-38080
G-8(t)	Tube 4X150G—SN BO-29205
G-9	United Packing List No. A 11363
G-9(a)	Tube 4X150G—SN H7-17449
G-9(b)	Tube 4X150G—SN DO-20794
G-9(c)	Tube 4X150G—SN F8-06811
G-9(d)	Tube 4X150G—SN I7-09712
G-9(e)	P/L A 11363 delineating tube 4X150G SN 1C-43231
G-9(f)	Tube 4X150G—SN J9-24541
G-9(g)	Tube 4X150G—SN 1G-35768
G-9(h)	Tube 4X150G—SN 1F-13747
G-9(i)	Tube 4X150G—SN CO-05318
G-9(j)	P/L delineating tube 4X150G—SN F8-14582
G-9(k)	Tube 4X150G—SN DO-14714
G-9(l)	Tube 4X150G—SN 1C-16913
G-9(m)	Tube 4X150G—SN BO-31128
G-9(n)	Tube 4X150G—SN 1G-22374
G-9(o)	Tube 4X150G—SN 1D-04828
G-9 p)	Tube 4X150G—SN D9-06036
G-9(q)	Tube 4X150G—SN EO-23862
G-9(r)	Tube 4X150G—SN BO-33622
G-9(s)	Tube 4X150G—SN J9-16667
G-9(t)	Tube 4X150G—SN AO-16444
G-10	United Packing List No. A 11364
G-10(a)	Tube 4X150G—SN J9-23199
G-10(b)	Tube 4X150G—SN E7-05811
G-10(c)	Tube 4X150G—SN I7-15712
G-10(d)	Tube 4X150G—SN C8-13118
G-10(e)	Tube 4X150G—SN I7-01429

NO.	DESCRIPTION OF EXHIBIT
G-10(f)	Tube 4X150G—SN EO-16345
G-10(g)	Tube 4X150G—SN L9-24115
G-10(h)	Tube 4X150G—SN G8-18875
G-10(i)	Tube 4X150G—SN L9-24256
G-10(j)	Tube 4X150G—SN AO-16348
G-10(k)	Tube 4X150G—SN I7-04620
G-10(l)	P/L delineating tube 4X150G—SN E7-06888
G-10(m)	Tube 4X150G—SN C7-07306
G-10(n)	Tube 4X150G—SN K9-44371
G-10(o)	Tube 4X150G—SN AO-25206
G-10(p)	Tube 4X150G—SN H7-06827
G-10(q)	Tube 4X150G—SN BO-31131
G-10(r)	Tube 4X150G—SN FO-31486
G-10(s)	Tube 4X150G—SN I7-15730
G-10(t)	Tube 4X150G—SN G7-14349
G-11	United Packing List No. A 11369
G-11(a)	Tube 4X150G—SN 1D-03986
G-11(b)	Tube 4X150G—SN 1C-29526
G-11(c)	Tube 4X150G—SN GO-26880
G-11(d)	Tube 4X150G—SN 1H-50193
G-11(e)	Tube 4X150G—SN 1C-29864
G-11(f)	Tube 4X150G—SN 2D-25248
G-11(g)	Tube 4X150G—SN 2H-13588
G-11(h)	Tube 4X150G—SN K9-38077
G-11(i)	Tube 4X150G—SN 2I-08029
G-11(j)	Tube 4X150G—SN 1C-21408
G-11(k)	Tube 4X150G—SN 1C-13584
G-11(l)	P/L delineating tube 4X150G—SN 1B-36464
G-11(m)	Tube 4X150G—SN 1C-16996
G-11(n)	Tube 4X150G—SN 2I-07986
G-11(o)	Tube 4X150G—SN 2G-18332
G-11(p)	Tube 4X150G—SN 2B-24426
G-11(q)	Tube 4X150G—SN 2H-13121
G-11(r)	Tube 4X150G—SN 2A-11984
G-12	United Packing List No. A 11370
G-12(a)	Tube 4X150G—SN 2H-16934
G-12(b)	Tube 4X150G—SN K9-42463
G-12(c)	Tube 4X150G—SN 2F-20919

NO.	DESCRIPTION OF EXHIBIT
G-12(d)	Tube 4X150G—SN 2A-12614
G-12(e)	Tube 4X150G—SN 2F-15200
G-12(f)	Tube 4X150G—SN 2I-17322
G-12(g)	Tube 4X150G—SN 2I-17495
G-12(h)	Tube 4X150G—SN 2I-08965
G-12(i)	Tube 4X150G—SN 2D-10886
G-12(j)	Tube 4X150G—SN 2G-23864
G-12(k)	Tube 4X150G—SN 2A-09665
G-12(l)	Tube 4X150G—SN 2H-16782
G-12(m)	Tube 4X150G—SN K9-39870
G-12(n)	Tube 4X150G—SN 2A-09562
G-12(o)	Tube 4X150G—SN 2B-58783
G-12(p)	Tube 4X150G—SN 2I-08279
G-12(q)	Tube 4X150G—SN 2G-24037
G-12(r)	Tube 4X150G—SN 2H-12607
G-12(s)	Tube 4X150G—SN 2F-16246
G-12(t)	Tube 4X150G—SN K9-42462
G-13	United Packing List No. A 11371
G-13(a)	Tube 4X150G—SN 1L-23200
G-13(b)	P/L delineating tube 4X150G—SN K9-38063
G-13(c)	Tube 4X150G—SN 2H-16835
G-13(d)	Tube 4X150G—SN 2F-35032
G-13(e)	Tube 4X150G—SN 2B-25202
G-13(f)	Tube 4X150G—SN DO-14637
G-13(g)	Tube 4X150G—SN K9-38069
G-13(h)	Tube 4X150G—SN 2D-19310
G-13(i)	Tube 4X150G—SN 2C-26366
G-13(j)	Tube 4X150G—SN 1J-51849
G-13(k)	Tube 4X150G—SN 2H-10989
G-13(l)	Tube 4X150G—SN 2I-13772
G-13(m)	Tube 4X150G—SN 1K-18565
G-13(n)	Tube 4X150G—SN 2I-09914
G-13(o)	Tube 4X150G—SN 2I-09194
G-13(p)	Tube 4X150G—SN 2I-13714
G-13(q)	Tube 4X150G—SN 2F-38479
G-14	United Packing List No. A 11372
G-14(a)	Tube 4X150G—SN 2F-45733
G-14(b)	Tube 4X150G—SN 2I-14797

NO.	DESCRIPTION OF EXHIBIT
G-14(c)	Tube 4X150G—SN 1J-13818
G-14(d)	Tube 4X150G—SN 2F-34960
G-14(e)	Tube 4X150G—SN 2C-28834
G-14(f)	Tube 4X150G—SN 1K-21701
G-14(g)	Tube 4X150G—SN 1L-42953
G-14(h)	Tube 4X150G—SN 2I-14798
G-14(i)	Tube 4X150G—SN 2I-08549
G-14(j)	Tube 4X150G—SN 2H-12285
G-14(k)	Tube 4X150G—SN 2D-20803
G-14(l)	Tube 4X150G—SN 2A-12373
G-14(m)	Tube 4X150G—SN 2B-24110
G-15	United Packing List No. A 12260
G-15(a)	Tube 4X150G—SN 1C-22284
G-15(b)	Tube 4X150G—SN 1L-21336
G-15(c)	Tube 4X150G—SN 1K-12055
G-15(d)	Tube 4X150G—SN 1L-10878
G-15(e)	Tube 4X150G—SN 1B-37399
G-15(f)	Tube 4X150G—SN 1D-04802
G-15(g)	Tube 4X150G—SN 1G-45820
G-15(h)	Tube 4X150G—SN 1D-12293
G-15(i)	Tube 4X150G—SN 1D-12528
G-15(j)	Tube 4X150G—SN 1C-29302
G-15(k)	Tube 4X150G—SN 2E-11985
G-15(l)	Tube 4X150G—SN 1D-10943
G-15(m)	P/L—Inv. delineating tube 4X150G SN 1C-29388
G-15(n)	Tube 4X150G—SN 1I-52768
G-15(o)	P/L—Inv. delineating tube 4X150G SN 1C-29384
G-15(p)	Tube 4X150G—SN 1D-12402
G-15(q)	P/L—Inv. delineating tube 4X150G SN 1I-58147
G-15(r)	Tube 4X150G—SN 1J-51317
G-15(s)	Tube 4X150G—SN 1I-58697
G-15(t)	P/L—Inv. delineating tube 4X150G SN 1B-37636
G-16	United Packing List No. A 12261
G-16(a)	Tube 4X150G—SN 1C-29355
G-16(b)	Tube 4X150G—SN 1F-26922
G-16(c)	P/L—Inv. delineating tube 4X150G SN 1C-21668
G-16(d)	Tube 4X150G—SN 1L-28326
G-16(e)	Tube 4X150G—SN 1J-15856

NO.	DESCRIPTION OF EXHIBIT
G-16(f)	Tube 4X150G—SN 1B-38344
G-16(g)	Tube 4X150G—SN 1D-12183
G-16(h)	Tube 4X150G—SN 1I-52273
G-16(i)	Tube 4X150G—SN 1D-28116
G-16(j)	Tube 4X150G—SN 1I-34960
G-16(k)	Tube 4X150G—SN 1B-36096
G-16(l)	Tube 4X150G—SN 2C-31994
G-16(m)	P/L—Inv. delineating tube 4X150G SN 1C-22212
G-16(n)	Tube 4X150G—SN JO-06651
G-16(o)	Tube 4X150G—SN 1K-23783
G-16(p)	Tube 4X150G—SN 1I-61581
G-16(q)	Tube 4X150G—SN IO-32387
G-16(r)	Tube 4X150G—SN 2A-09659
G-16(s)	Tube 4X150G—SN AO-14421
G-16(t)	Tube 4X150G—SN 1D-03083
G-17	United Packing List No. A 12262
G-17(a)	Tube 4X150G—SN 1D-28217
G-17(b)	Tube 4X150G—SN 1C-11274
G-17(c)	Tube 4X150G—SN AO-10355
G-17(d)	Tube 4X150G—SN 1C-13499
G-17(e)	Tube 4X150G—SN L9-23624
G-17(f)	Tube 4X150G—SN 1G-33418
G-17(g)	P/L delineating tube 4X150G—SN LO-22993
G-17(h)	Tube 4X150G—SN 1C-29066
G-17(i)	Tube 4X150G—SN AO-13038
G-17(j)	Tube 4X150G—SN K9-26257
G-17(k)	Tube 4X150G—SN L9-17974
G-17(l)	Tube 4X150G—SN 1D-28782
G-17(m)	P/L—Inv. delineating tube 4X150G SN 1C-37636
G-17(n)	Tube 4X150G—SN IO-34358
G-17(o)	Tube 4X150G—SN 1L-21824
G-17(p)	Tube 4X150G—SN 1L-09768
G-17(q)	Tube 4X150G—SN 1B-25725
G-17(r)	Tube 4X150G—SN 1C-29007
G-17(s)	Tube 4X150G—SN 1D-24416
G-17(t)	Tube 4X150G—SN 1D-03219
G-18	United Packing List No. A 12263
G-18(a)	Tube 4X150G—SN 2A-12495

NO.	DESCRIPTION OF EXHIBIT
G-18(b)	Tube 4X150G—SN 1D-03359
G-18(c)	Tube 4X150G—SN 1C-21679
G-18(d)	Tube 4X150G—SN 2A-11227
G-18(e)	P/L—Inv. delineating tube 4X150G SN 1C-38475
G-18(f)	Tube 4X150G—SN 1C-11220
G-18(g)	Tube 4X150G—SN 1C-10731
G-18(h)	Tube 4X150G—SN 1C-29046
G-18(i)	Tube 4X150G—SN 1C-29303
G-18(j)	P/L A12263 delineating tube 4X150G SN 1D-04509
G-18(k)	Tube 4X150G—SN 1C-13299
G-18(l)	Tube 4X150G—SN 1C-29331
G-18(m)	Tube 4X150G—SN 1C-20537
G-18(n)	P/L—Inv. delineating tube 4X150G SN 1C-16929
G-18(o)	Tube 4X150G—SN 1B-28877
G-18(p)	Tube 4X150G—SN 1C-18013
G-18(q)	Tube 4X150G—SN 1C-29138
G-18(r)	P/L—Inv. delineating tube 4X150G SN 1C-17028
G-18(s)	Tube 4X150G—SN 1F-11282
G-18(t)	Tube 4X150G—SN 1I-52039
G-19	United Packing List No. A 12264
G-19(a)	Tube 4X150G—SN 1C-28614
G-19(b)	P/L—Inv. delineating tube 4X150G SN 1D-10674
G-19(c)	P/L delineating tube 4X150G—SN 1C-29021
G-19(d)	Tube 4X150G—SN 1C-45699
G-19(e)	P/L—Inv. delineating tube 4X150G SN 1C-29101
G-19(f)	P/L—Inv. delineating tube 4X150G SN 1F-26429
G-19(g)	Tube 4X150G—SN 1C-21281
G-19(h)	Tube 4X150G—SN 1C-46840
G-19(i)	Tube 4X150G—SN 1C-12307
G-19(j)	Tube 4X150G—SN 1D-04350
G-19(k)	Tube 4X150G—SN 1G-23337
G-19(l)	Tube 4X150G—SN 1C-37440
G-19(m)	Tube 4X150G—SN 1C-45551
G-19(n)	P/L—Inv. delineating tube 4X150G SN 1C-22305
G-19(o)	Tube 4X150G—SN 1C-46928
G-19(p)	Tube 4X150G—SN 1C-45462
G-19(q)	Tube 4X150G—SN 1D-24620
G-19(r)	P/L delineating tube 4X150G—SN 1D-05285

NO.	DESCRIPTION OF EXHIBIT
G-19(s)	Tube 4X150G—SN 1D-05439
G-19(t)	Tube 4X150G—SN 1C-10619
G-19(u)	Tube 4X150G—SN 1C-27909
G-19(v)	Tube 4X150G—SN 1C-21592
G-19(w)	Tube 4X150G—SN 1C-12808
G-19(x)	Tube 4X150G—SN 1D-12373
G-19(y)	Tube 4X150G—SN 1G-24360
G-19(z)	Tube 4X150G—SN 1G-21669
G-19(aa)	Tube 4X150G—SN 1D-03323
G-19(bb)	Tube 4X150G—SN 1D-29982
G-19(cc)	Tube 4X150G—SN 1G-33711
G-20	United Packing List No. A 12265
G-20(a)	Tube 4X150G—SN 1L-39932
G-20(b)	Tube 4X150G—SN L9-18197
G-20(c)	Tube 4X150G—SN 1K-17174
G-20(d)	Tube 4X150G—SN 1C-20496
G-20(e)	Tube 4X150G—SN 1K-43823
G-20(f)	Tube 4X150G—SN GO-26812
G-20(g)	Tube 4X150G—SN 1L-08808
G-20(h)	Tube 4X150G—SN 1C-17947
G-20(i)	Tube 4X150G—SN 1D-24499
G-20(j)	Tube 4X150G—SN 1I-52219
G-20(k)	Tube 4X150G—SN 1C-11180
G-20(l)	Tube 4X150G—SN 1C-13177
G-20(m)	Tube 4X150G—SN 1J-05374
G-20(n)	Tube 4X150G—SN 1C-13838
G-20(o)	P/L delineating tube 4X150G—SN 1D-12546
G-20(p)	Tube 4X150G—SN 1C-12497
G-20(q)	Tube 4X150G—SN 1C-18172
G-20(r)	Tube 4X150G—SN L9-35357
G-20(s)	P/L delineating tube 4X150G—SN 1C-42619
G-20(t)	Tube 4X150G—SN 1J-46112
G-21	United Packing List No. A 12268
G-21(a)	Tube 4X150G—SN 1K-21745
G-21(b)	Tube 4X150G—SN 1C-18022
G-21(c)	Tube 4X150G—SN 1J-50359
G-21(d)	Tube 4X150G—SN 1G-31976
G-21(e)	Tube 4X150G—SN 1G-32437

NO.	DESCRIPTION OF EXHIBIT
G-21(f)	Tube 4X150G—SN 1C-11197
G-21(g)	Tube 4X150G—SN 1C-29105
G-21(h)	Tube 4X150G—SN L9-08902
G-21(i)	Tube 4X150G—SN 1C-29561
G-21(j)	Tube 4X150G—SN 1D-04753
G-21(k)	Tube 4X150G—SN AO-14548
G-21(l)	Tube 4X150G—SN 1C-46901
G-21(m)	Tube 4X150G—SN AO-14534
G-21(n)	Tube 4X150G—SN 1D-12331
G-21(o)	Tube 4X150G—SN 1D-03926
G-21(p)	Tube 4X150G—SN L9-23956
G-21(q)	Tube 4X150G—SN 1D-24633
G-21(r)	Tube 4X150G—SN 1D-03925
G-21(s)	Tube 4X150G—SN 1L-13500
G-21(t)	P/L—Inv. delineating tube 4X150G SN 1C-10387
G-22	Government Contract #DA-36-AMC-01080(E) with Model Engineering & Mfg. Co. dated 8/29/62
G-23(a)	Government Voucher #124842, dated 2/18/64 with MEMCOR Invoices & Inspection Report
G-23(b)	Government Voucher #125189, dated 3/4/64
G-23(c)	Government Voucher #125544, dated 3/24/64
G-23(d)	Government Voucher #125937, dated 4/13/64
G-23(e)	Government Voucher #126335, dated 4/29/64
G-23(f)	Government Voucher #126726, dated 5/14/64
G-23(g)	Government Voucher #127370, dated 6/12/64
G-23(h)	Government Voucher #120601, dated 7/31/64
G-24	Patent Registration No. 504,860 for JAN
G-25	Model Engineering "Certification"
G-26	Sonora Electromatics file on United National Labs transaction with Model Engineering (FBI file)
G-26(a)	Model Engineering Purchase Order No. 1-63645 E dated 4/4/63
G-26(b)	Model Engineering Purchase Order dated 9/27/63
G-26(c)	Model Engineering Purchase Order dated 12/26/63
G-26(d)	Model Engineering Shipping Memo dated 1/9/64
G-26(e)	Model Engineering Shipping Memo dated 1/14/64
G-26(f)	Model Engineering Shipping Memo dated 4/2/64
G-26(g)	Arthur H. Richardson, Inc. triplicate invoices (8)
G-26(h)	Arthur H. Richardson, Inc. invoice packet (3)

NO.	DESCRIPTION OF EXHIBIT
G-26(i)	Saxon Laboratory, Inc. documents (18)
G-26(j)	United National Labs Invoices with REA receipts (11)
G-26(k)	Arthur H. Richardson, Inc. Credit Memorandum dated 3/13/64 (3)
G-26(l)	United National Labs Packing Lists (4)
G-26(m)	Miscellaneous papers (4)
G-27(a)	Arthur H. Richardson, Inc. triplicate invoice #10149
G-27(b)	Arthur H. Richardson, Inc. triplicate invoice #10397
G-27(c)	Arthur H. Richardson, Inc. triplicate invoice #10506
G-27(d)	Arthur H. Richardson, Inc. triplicate invoice #09950
G-28	Bornstein's sworn statement dated 8/14/64
G-29	Page's sworn statement dated 8/14/64
G-30	Page's sworn statement dated 10/6/64
G-31	Page's sworn statement dated 10/15/64 (12)
G-32	Bornstein's letter to Model Engineering dated 1/24/64
G-33	Page's letter to Model Engineering dated 5/10/63
G-34	Indictment in Cr. No. 516-65
G-35	Bornstein Judgment of Conviction
G-36	Page Judgment of Conviction
G-37	Eagle Stamp in envelope
G-38	Bornstein Response to Requests for Admissions
G-39	Page Response to Requests for Admissions
G-40	Page Response to Request for Admissions admitting substance of Paragraph 3 of Complaint
G-41	Bornstein Answer Admitting Paragraph 3 of Complaint
G-42	Bornstein Answer admitting paragraph 15 of Complaint
G-43	Page Answer admitting paragraph 18 of Complaint
G-44	EIMAC Sales Order dated April 30, 1963
G-45	United Packing List A 11073 Dated January 16, [1964].

R/O — FORM 7

Index
Reviewed

Standard Form 33 (Oct. 1957 Edition) General Services

INVITATION, BID, AND AWARD
(SUPPLY CONTRACT)

CONTRACT NO.	PAGE NO.	NUMBER OF PAGES
DA-36-039-AMC-01080(E)	1	
ORDER NO. (If any) 1203-PP-63-A1-AX		

ADDRESS

U. S. ARMY SIGNAL SUPPLY AGENCY — 225 SOUTH 18TH STREET, PHILADELPHIA 3, PENNSYLVANIA

INVITATION FOR BIDS

DATE ISSUED 4 May 1962 — INVITATION NO. SC-36-039-62-2280-A1 w/Amd. #1

Sealed bids in triplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions (Standard Form 32, Sept. 1961 edition), which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 1130 o'clock A m., DS Time, 29 May 1962 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delivery f. o. b. (See Provision C)

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

SCHEDULE

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (No. of units)	UNIT	UNIT PRICE	AMOUNT
	SUBJECT: RADIO SET GROUP OA-1387( )/GRC: ITEM(S) SET FORTH ON PAGE(S) 5 THRU 22 "This contract is authorized by 10 U.S.C. 2304 (Public Law 1028, 84th Congress) approved 10 August 1956." (*S-F 124/5) DO Rating A-7 is certified for National Defense Use under DMS Regulation No. 1.	NOTE: All matters dealing with this solicitation PRIOR TO OPENING should be directed in writing to Mr. I. Sherman, Commodity Procurement Branch A-1, Telephone Kingsley 6-3200, Ext. 8140, AFTER OPENING, directed to Mr. J. Lynn, Ext. 8141, AND Name: Wm. E. Hughes Telephone: 104 Ext. 42 (Bidder is requested to fill in above blanks.)			

BID

DATE OF BID May 25, 1962

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within 60 calendar days (*60 calendar days unless a different period be inserted by the bidder*) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

½ percent, 10 calendar days; ½ percent, 20 calendar days; Net percent, 30 calendar days.

BIDDER REPRESENTS: (*Check appropriate boxes*)

(1) That he ☒ is, ☐ is not, a small business concern. (*See definition on reverse hereof.*) If bidder is a small business concern and is not the manufacturer of the supplies bid upon, he also represents that all supplies to be furnished hereunder ☐ will, ☐ will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a ☐ regular dealer in, ☒ manufacturer of, the supplies bid upon.

(3) (a) That he ☐ has, ☒ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☒ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer.
(*For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Part 1-30.*)

(4) He operates as an ☐ individual, ☐ partnership, ☒ corporation, incorporated in the State of Indiana

NAME AND ADDRESS OF BIDDER (*Street, city, zone, and State. Type or print*)	SIGNATURE OF PERSON AUTHORIZED TO SIGN BID
Model Engr. & Mfg. Corp. 50 Frederick St. Huntington, Indiana	→ W. E. Hughes TYPE OR PRINT BIDDER'S NAME AND TITLE Wm. E. Hughes, Vice President

AWARD

DATE OF AWARD 29 August 1962

ACCEPTED AS TO ITEMS NUMBERED	AMOUNT
1 thru 8	$1,472,455.72

UNITED STATES OF AMERICA
BY Louis E. Cather
LOUIS E. CATHER, Major, SigC Contracting Officer

SUBMIT INVOICE FOR PAYMENT TO
Finance & Accounting Officer
Finance & Accounting Office, USASSA
225 South 18th Street, Phila. 3, Pa.
ATTN: SIGSU-BK-2a (See Page 3A)

ACCOUNTING AND APPROPRIATION DATA
The cost of supplies is chargeable to the following allotments:
21X2030 362-6209 P4041-31 S36-039 SEA 60600
"LIQUIDATED DAMAGES"

PAYMENT WILL BE MADE BY
Same as above

Award will be made on this Form, or on Standard Form 26, or by other written notice.

BEST COPY AVAILABLE

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GOVERNMENT EXHIBIT
G-23 (C)

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

U S

Voucher prepared at

Payee

Model Engineering & Mfg Corp
Huntington, Indiana

Date Invoice 11 Jan 64 Delivery 31 Jan 64

J. W. COTTERILL
MAJOR, P. C.

Contract AF33(657)-8102C(E)

15 Jan 64 AF33(657)-51 See Form #1025 Attached 39,943.25
EBG/bz 31 Jan 64
Mods #8

22021
Credit-Encumbrance for Progress Payment 11 M=I
21x3030 262-7520 P4041-31 S36-0915 C1 28
SE# 60600 CP1=1068 (119,963.69) G-2

Credit-Assessment for Liquidated Damages 63
21x3030 262-7520 P4041-31 S36-0915 (10,612.88)
SE# 60600 CP1=1068 22021 11

23

CU-1714

R. C. LEWIS
LT COL, P. C. SYM 5034

39,943.25

Approved for

Exchange rate

AF33(657)-51 AF33(657)-8102C(E) 39,943.25

21x3030 262-7520 P4041-31 S36-0915 170,519.82
SE# 60600 CP1=1068

22021

Check No

Check Issued

Paid by

Cash

Paid

Per

Title

BEST COPY AVAILABLE

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May 22, 1973

The Honorable John J. Kitchen
United States District Judge
P.O. Building & Court House
Camden, New Jersey

Re: U.S.A. v. Philip L. Bornstein, et al.
Civil Action No. 1141-67

Dear Judge Kitchen:

In compliance with Stipulation No. 17(o) in the Stipulation of Facts filed in the captioned matter on April 13, 1973, we are enclosing the official records of the Tobyhanna Army Depot, Tobyhanna, Pennsylvania, certified under the seal of the Secretary of the Army, which consist of and report the following:

1. Letter dated June 18, 1964, from the Chief, Quality Assurance Office, Department of the Army, directing, *inter alia*, that:

"Box 5/5 subject equipment received from Model Engineering Mfg. Corp., P.O. 15263-PP-63 be opened and *all electron tubes type 4X150G*, FSN 5960-264-9508, manufactured by Eitel-McCullough (Eimac) *be replaced with tubes from stock.* * * *" (Emphasis supplied),

and

"All tubes removed from the equipment must be isolated and placed in * * * a secure location. * * *".

2. Coordination Sheet, dated July 2, 1964, consisting of two pages, referencing the June 18, 1964 letter, reporting, *inter alia*, at page 1 thereof: "*Requirements of referenced letter has* (sic) *been accomplished.*"

and

"Two hundred and ninety-eight (298) such tubes have been removed from 149 each Accessory Kits,

boxes #5/5, are being held in abeyance in the security area. *Tubes have been obtained to replace the tubes taken from the accessory kits.* Sets have been retained in issue stock." (Emphasis supplied).

and reporting, at page 2 thereof, the replacement cost for each 4X150G electron tube, as follows:

"300 each tube type 4X150G at $40.82—$12,246.00."

As is indicated on the designated page 2 of the attachment, 48 radio kit sets, each containing two 4X150G electron tubes, were shipped from the Tobyhanna Army Depot to the Lexington Blue Grass Army Depot, Lexington, Kentucky and to the Electronic Proving Ground, Fort Huachuca, Arizona. The subject tubes in these sets were not examined at Tobyhanna prior to shipment. In addition, 48 radio kit sets, each also containing two 4X150G electron tubes, were shipped to the Sacramento Army Depot, Sacramento, California. We are awaiting the receipt of certified copies of comparable official documents, under the seal of the Secretary of the Army, or affidavits, from each of the aforesaid depots. We anticipate that we will be in receipt of such documentation by no later than May 30, 1973. However, in lieu thereof, if the defendants are willing to stipulate to the cost of replacing the 4X150G electron tubes in the kits shipped to said depots on the basis of the enclosure, the proofs for this aspect of the case can be closed and the matter could be set down for argument forthwith.

By carbon copy of this letter, the attorneys for the defendants are being provided with a copy of the enclosure and are being requested to immediately advise us

whether or not they will accept the enclosure as proof of the replacement cost for each 4X150G electron tube.

Respectfully,

HERBERT J. STERN
United States Attorney

By: CAROLYN E. ARCH
Assistant U.S. Attorney

Encl.
CM/RRR No. 271140

cc: Jack Ballan, Esq.
CM/RRR No. 271141

William Rossmoore, Esq.
CM/RRR No. 271142

UNITED STATES OF AMERICA

[SEAL]

DEPARTMENT OF THE ARMY

Tobyhanna, Pa. 18 April 73

I HEREBY CERTIFY that the documents attached hereto are true and correct copies of letter dated July 1964, with attachments, and Disposition Form dated 18 June 1964 pertaining to quantity of vacuum tubes 4X 150G supplied by Model Engineering and Manufacturing Corporation, official documents in the custody of the Director for Quality Assurance at Tobyhanna Army Depot, Tobyhanna, Pa.

/s/ William J. Lord
(Signature of Custodian)
WILLIAM J. LORD
Director of Quality Assurance

I HEREBY CERTIFY that William J. Lord, who signed the foregoing certificate, is the Director for Quality Assurance and custodian of the official document contained in this file, and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, ROBERT F. FROEHLKE, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this 23rd day of April, 1973.

/s/ Robert F. Froehlke
ROBERT F. FROEHLKE
Secretary of the Army

By /s/ John G. Connell, Jr.
Administrative Assistant

[ILLEGIBLE] FORM

[FOR OFFICIAL USE ONLY]

Symbol or File Reference: SSMTO-AQ

Subject: Radio Set, Group OA-1387A, TRC, FSN 5820-892-0698

To—Ch, SPAR

From—Ch, Qual Assur O

Date—18 Jun 64

CMT I

S. Ponder/ama/249

1. Request that Box 5/5 subject equipment received from Model Engineering Mfg. Corp., P.O. 15263-PP-63 be opened and all electron tubes type 4X150G, FSN 5960-264-9508, manufactured by Eitel-McCullough (Eimac) be replaced with tubes from stock. Tubes are available in stock procured from Eitel-McCullough on P.O. 07200-PP-61.

2. All tubes removed from the equipment must be isolated and placed in CRC-9 in a secure location. Each tube must be tagged or otherwise identified as being removed from a specific serial number, pkd, date, etc., and signed by two responsible individuals, capable of attesting in criminal or civil proceedings. Photograph should be taken to depict various phases of the project.

3. The serial number and manufactured date number are to be recorded for reporting to the Chicago Army District. This office will formalize the report on completion.

4. Subject stock is to be retained in issue stock on completion of the project. It is currently frozen from issue.

5. Mr. Gabriel Unis, QC Specialist, of this office will be present to witness the operation. Request that he be contacted when the project is started.

6. Request this project be expedited.

/s/ Seldon Ponder
SELDON PONDER
Chief, Quality Assurance
Office

Cy furn:

Legal O (2 cys)
Ch, Storage Div

TO C/Storage Div.
From C/SPAR Div.

Date 25 June 64

CMT 2

T O'HARA/mv/610

Request concurrence with comment No. 1 and SPAR Division notified of action completion.

/s/ Thomas W. O'Hara
MASON C. LINN
C/SPAR Div.

COMEBACK COPY: Q.A.O.

COORDINATION SHEET

["FOR OFFICIAL USE ONLY"]

2 JUL 1964

SSMTO-AQ-C

SUBJECT: Alleged MIL-E-1 Irregularities of Vacuum Tubes Jan 4X150G, Reference DA-36-039-01188(E) and DA-36-039-01080(E)

TO: Commanding Officer
U.S. Army Material Command
Chicago Procurement District
ATTN: AMXCH-IT-3
623 South Wabash Avenue
Chicago, Illinois 60605

1. Reference your letter dated 18 June 1964.

2. Requirements of referenced letter has been accomplished.

a. Quantity of one hundred fifty (150) sets were available in depot stock.

b. One (1) set remaining intact as received, has been frozen from issue, and held in the security area.

c. Two hundred and ninety-eight (298) subject tubes have been removed from 149 each Accessory Kits, boxes #5/5, are being held in abeyance in the security area. Tubes have been obtained to replace the tubes taken from the accessory kits. Sets have been retained in issue stock.

d. Attached as inclosure #1 is a list of subject tube serial numbers, and other required information.

e. Inclosure #2 is a sample of the tag that was annotated, signed and attached to each of the 298 each tubes removed from the 149 each Accessory Kits, box #5 of 5.

3. Records at this depot indicate that forty-eight (48) sets were shipped to the following consignees:

a. 39 each on requisition number A2256641040438 and 1 each on requisition #A2256641040439 to Signal Stock Account Programmed Stock, Lexington Army Depot, Lexington, Kentucky.

b. 8 each on requisition #A6130041072126 to Consolidated Supply Property Officer, U.S.A. Electronic Proving Ground, Fort Huachuca, Arizona.

4. The following is a cost break-down for labor, material and inspection to remove tubes from 149 sets:

20.5 hrs @	$2.93 per hr.	$ 60.07
20.5 hrs @	2.28 per hr.	46.74
61.5 hrs @	2.36 per hr.	145.14
20.5 hrs @	4.27 per hr.	87.54
123 hrs total labor		$ 339.49
overhead 123 hrs @ 0.95		116.85
Total labor		$ 456.34
300 each tube type 4X150G @ $40.82		$12,246.00
Total		$12,702.34

5. Photographs depicting various phases of this project i.e. removing tubes from kits, are available for evidentiary purposes from this headquarters upon request.

6. 298 each tube type 4X150G are being held in abeyance pending disposition instructions from your office.

FOR THE COMMANDER:

B. R. YARGS
1st Lt, CrdC
Adjutant

2 Incl
as
Cy furn:

CG, USAMC, ATTN: AMCGC-S, WASH DC
CG, USASMC, ATTN: Judge Advocate
Wash, D.C., (2 cys)
CG, USASMC, ATTN: AMSSN-QA, Wash, DC

[Dispatched 2 Jul 1964—Dispatched Message Center Tobyhanna Army Depot]

Serial Numbers	Box Number	Partial No.	B/L No.
DO-23703	48-50	6	B7339243
2H-16782	48-50	6	B7339243
K9-42463	44-50	6	B7339243
1C-21408	44-50	6	B7339243
J-9-16341 (B, R or P)	45-50	6	B7339243
O-40069	45-50	6	B7339243
2F-20919	43-50	6	B7339243
2H-12285	43-50	6	B7339243
2H-12607	46-50	6	B7339243
2I-09194	46-50	6	B7339243
2F-15200	45-50	5	B7339242
2D-20803	45-50	5	B7339242
2D-25248	42-50	5	B7339242
2I-17322	42-50	5	B7339242
2I-09914	47-50	5	B7339242
2G-18332	47-50	5	B7339242
AO-22382	49-50	6	B7339243
2F-45738	49-50	6	B7339243
J9-22904	42-50	6	B7339243
DO-16655	42-50	6	B7339243
2G-24037	50-50	5	B7339242
2H-16934	50-50	5	B7339242
2F-38479	48-50	5	B7339242
2H-13121	48-50	5	B7339242
2C-26366	46-50	5	B7339242
2F-35032	46-50	5	B7339242
1L-42953	44-50	5	B7339242
2B-25202	44-50	5	B7339242
3L-08535	28-30	20	B7340402
3L-06243	28-30	20	B7340402
2G-23864	43-50	5	B7339242
2A-12373	43-50	5	B7339242
D9-06036	42-50	4	B7339098
3K-30824	42-50	4	B7339098
2I-07986	41-50	5	B7339242
1K-21701	41-50	5	B7339242
3L-05690	45-50	4	B7339098
1C-29196	45-50	4	B7339098
AO-25206	41-50	4	B7339098
3L-04779	41-50	4	B7339098

Serial Numbers	Box Number	Partial No.	B/L No.
1F-04349	50-50	2	B7338449
2I-13406	50-50	2	B7338449
1C-28145	41-50	2	B7338449
1A-09209	41-50	2	B7338449
1B-11125	46-50	2	B7338449
1H-05366	46-50	2	B7338449
L9-05282	44-50	2	B7338449
1F-23746	44-50	2	B7338449
1H-04767	48-50	3	B7339097
2I-16383	48-50	3	B7339097
1D-04323	45-50	1	B7338448
1B-36135	45-50	1	B7338448
1B-10427	46-50	3	B7339097
2H-13895	46-50	3	B7339097
2G-23679	48-50	2	B7338449
2H-16976	48-50	2	B7338449
2C-32202	47-50	2	B7338449
2H-15202	47-50	2	B7338449
1J-12551	45-50	3	B7339097
2I-07867	45-50	3	B7339097
3L-11264	50-50	4	B7339098
3L-06889	50-50	4	B7339098
3L-08534	49-50	4	B7339098
FO-19782	49-50	4	B7339098
2I-14798	49-50	5	B7339242
2H-13588	49-50	5	B7339242
2F-13192	50-50	3	B7339097
1C-11282	50-50	3	B7339097
3L-09744	46-50	4	B7339098
EO-24488	46-50	4	B7339098
3L-04655	44-50	4	B7339098
EO-16345	44-50	4	B7339098
L9-21255	47-50	4	B7339098
FO-32384	47-50	4	B7339098
BO-31128	43-50	4	B7339098
DO-16634	43-50	4	B7339098
3L-06357	48-50	4	B7339098
3K-14363	48-50	4	B7339098
1C-21304	49-50	1	B7338448
1C-20586	49-50	1	B7338448
2B-27361	43-50	2	B7338449
1C-29454	43-50	2	B7338449
1C-27970	49-50	2	B7338449
1C-37490	49-50	2	B7338449
1A-10293	42-50	2	B7338449
1B-29512	42-50	2	B7338449

Serial Numbers	Box Number	Partial No.	B/L No.
1I-59628	42-50	3	B7339097
1H-55380	42-50	3	B7339097
2I-08307	41-50	3	B7339097
2G-24061	41-50	3	B7339097
2I-06542	49-50	3	B7339097
2I-22312	49-50	3	B7339097
1C-37516	47-50	3	B7339097
1D-20008	47-50	3	B7339097
1D-04600	43-50	3	B7339097
1C-37830	43-50	3	B7339097
1F-22929	44-50	3	B7339097
2I-08632	44-50	3	B7339097
1B-10565	45-50	2	B7338449
1C-22299	45-50	2	B7338449
1F-22625	44-50	1	B7338448
1C-28057	44-50	1	B7338448
1F-11142	42-50	1	B7338448
1D-04364	42-50	1	B7338448
1F-13259	46-50	1	B7338448
1D-12571	46-50	1	B7338448
1G-32008	41-50	1	B7338448
1C-16972	41-50	1	B7338448
1F-47216	47-50	1	B7338448
1D-03999	47-50	1	B7338448
1C-37453	48-50	1	B7338448
1C-13420	48-50	1	B7338448
1D-04460	50-50	1	B7338448
1C-16977	50-50	1	B7338448
1J-05734	50-50	14	B7339935
1D-04802	50-50	14	B7339935
1E-29495	43-50	14	B7339935
1C-13442	43-50	14	B7339935
1B-37399	44-50	14	B7339935
L9-17974	44-50	14	B7339935
1B-38157	43-50	1	B7338448
1C-45676	43-50	1	B7338448
1D-12402	42-50	13	B7339934
1B-38344	42-50	13	B7339934
1C-45551	49-50	14	B7339935
1C-29066	49-50	14	B7339935
1I-52768	46-50	14	B7339935
1C-27909	46-50	14	B7339935
1C-37540	45-50	14	B7339935
1O-21216	45-50	14	B7339935
1L-23200	49-50	7	B7339244
2I-08965	49-50	7	B7339244

Serial Numbers	Box Number	Partial No.	B/L No.
1J-13818	46-50	7	B7339244
2I-08549	46-50	7	B7339244
2D-10886	50-50	7	B7339244
2I-13714	50-50	7	B7339244
1C-10804	47-50	7	B7339244
DO-11641	47-50	7	B7339244
1C-16996	42-50	8	B7339456
K9-39870	42-50	8	B7339456
2A-12614	41-50	7	B7339244
2F-16246	41-50	7	B7339244
2C-28834	48-50	7	B7339244
K9-38062	48-50	7	B7339244
2A-09665	45-50	7	B7339244
2B-24426	45-50	7	B7339244
2I-08279	42-50	7	B7339244
1K-18565	42-50	7	B7339244
2I-14797	44-50	7	B7339244
2B-24110	44-50	7	B7339244
1C-29526	50-50	8	B7339456
K9-38069	50-50	8	B7339456
2A-11984	44-50	8	B7339456
1B-37464	44-50	8	B7339456
2H-16835	43-50	7	B7339244
1D-03986	43-50	7	B7339244
2I-13772	50-50	6	B7339243
2I-17495	50-50	6	B7339243
2F-34960 Loose Dome	47-50	6	B7339243
BO-29203	47-50	6	B7339243
2H-10989	41-50	6	B7339243
2B-58783	41-50	6	B7339243
DO-14637	45-50	8	B7339456
1C-13584	45-50	8	B7339456
2A-09562	49-50	8	B7339456
2I-08029	49-50	8	B7339456
1C-29864	46-50	8	B7339456
1H-50193	46-50	8	B7339456
3L-08019	43-50	8	B7339456
K9-42462	43-50	8	B7339456
CO-26880	41-50	8	B7339456
K9-38077	41-50	8	B7339456
1B-38163	66-75	10	B7339458
DO-14714	66-75	10	B7339458
L9-23934	49-50	9	B7339457
CO-24254	49-50	9	B7339457
1H-07858	61-75	10	B7339458
G7-14349	61-75	10	B7339458

Serial Numbers	Box Number	Partial No.	B/L No.
BO-23862	63-75	10	B7339458
I7-01429	63-75	10	B7339458
1C-29015	64-75	10	B7339458
1C-28062	64-75	10	B7339458
3K-30220	74-75	10	B7339458
1G-22374	74-75	10	B7339458
I7-09700	41-50	11	B7339459
K9-38084	41-50	11	B7339459
3L-04391	70-75	10	B7339458
3I-14251	70-75	10	B7339458
H7-17449	50-50	11	B7339459
1C-29347	50-50	11	B7339459
I7-15753	43-50	11	B7339459
1C-29116	43-50	11	B7339459
G8-18875	46-50	11	B7339459
E7-05811	46-50	11	B7339459
1C-37862	47-50	11	B7339459
K9-44371	47-50	11	B7339459
1C-37691	42-50	11	B7339459
1F-11552	42-50	11	B7339459
1C-29016	49-50	11	B7339459
1C-28941	49-50	11	B7339459
I7-15730	45-50	11	B7339459
1C-37558	45-50	11	B7339459
1I-58697	42-50	15	B7339936
2A-09659	42-50	15	B7339936
1C-28985	49-50	12	B7339933
1D-28782	49-50	12	B7339933
1C-17100	44-50	11	B7339459
1C-21543	44-50	11	B7339459
1C-28937	46-50	12	B7339933
1D-05022	46-50	12	B7339933
1C-46928	48-50	16	B7339937
1C-21679	48-50	16	B7339937
1C-18172	43-50	12	B7339933
1C-29007	43-50	12	B7339933
1C-13177	50-50	17	B7340225
1C-37440	50-50	17	B7340225
1C-10396	47-50	12	B7339933
1C-10619	47-50	12	B7339933
1K-43823	45-50	12	B7339933
IO-32253	45-50	12	B7339933
3K-30063	47-50	8	B7339456
3G-23261	47-50	8	B7339456
1C-13729	41-50	12	B7339933
1L-21336	41-50	12	B7339933

Serial Numbers	Box Number	Partial No.	B/L No.
3L-11740	73-75	10	B7339458
3L-04777	73-75	10	B7339458
3I-21268	68-75	10	B7339458
3L-05131	68-75	10	B7339458
1F-13747	65-75	10	B7339458
3L-09777	65-75	10	B7339458
I7-01524	48-50	11	B7339459
1G-35768	48-50	11	B7339459
I7-09712	75-75	10	B7339458
1C-13748	75-75	10	B7339458
3L-11830	69-75	10	B7339458
3L-08567	69-75	10	B7339458
L9-24115	72-75	10	B7339458
H7-06827	72-75	10	B7339458
1C-13299	50-50	12	B7339933
1C-18024	50-50	12	B7339933
1G-45820	48-50	12	B7339933
L9-08902	48-50	12	B7339933
1L-39932	42-50	12	B7339933
1C-29105	42-50	12	B7339933
2D-19310	48-50	8	B7339456
1J-51849	48-50	8	B7339456
L9-24256	47-50	9	B7339457
B,P or R O-39921	47-50	9	B7339457
C8-13118	42-50	9	B7339457
2H-16724	42-50	9	B7339457
AO-14548	42-50	14	B7339935
1C-46707	42-50	14	B7339935
1D-12220	41-50	14 Loose dome	B7339935
1D-03187	41-50	14	B7339935
1E-12748	48-50	14	B7339935
1B-10544	48-50	14	B7339935
2A-11227	50-50	13	B7339934
1C-11180	50-50	13	B7339934
1D-12373	48-50	13	B7339934
1B-28877	48-50	13	B7339934
1I-61581	45-50	13	B7339934
1G-33418	45-50	13	B7339934
FO-31486	71-75	10	B7339458
K9-38080	71-75	10	B7339458
3L-06430	67-75	10	B7339458
3L-05354	67-75	10	B7339458
1C-13672	62-75	10	B7339458
1C-29529	62-75	10	B7339458
L9-28972	50-50	9	B7339457

Serial Numbers	Box Number	Partial No.	B/L No.
1F-36686	50-50	9	B7339457
AO-16444	45-50	9	B7339457
L9-42428	45-50	9	B7339457
2I-09008	41-50	9	B7339457
I7-15664	41-50	9	B7339457
DO-20794	43-50	9	B7339457
BO-33622	43-50	9	B7339457
2H-13682	44-50	9	B7339457
BO-40042	44-50	9	B7339457
J9-16667	46-50	9	B7339457
J9-23199	46-50	9	B7339457
1C-37585	48-50	9	B7339457
DO-11579	48-50	9	B7339457
1D-12183	47-50	14	B7339935
K9-26257	47-50	14	B7339935
1G-23337	43-50	13	B7339934
1D-04753	43-50	13	B7339934
1C-29046	47-50	13	B7339934
1C-18022	47-50	13	B7339934
1C-46901	46-50	13	B7339934
GO-26812	46-50	13	B7339934
AO-14534	44-50	13	B7339934
1K-12055	44-50	13	B7339934
1L-10878	49-50	13	B7339934
1G-31976	49-50	13	B7339934
1C-18013	41-50	13	B7339934
1D-10943	41-50	12	B7339933
1C-10731	44-50	12	B7339933
I7-15712	44-50		

DATE OF INSPECTION _____

SHIPMENT NUMBER ON WHICH RECEIVED ____

BILL OF LADING NUMBER _____

CONTRACT NUMBER DA-36-039-AMC-01080(E)
P.O. 15263-PP-63-A1-51

SIGNATURE OF INSPECTOR _____
GABRIEL F. UNIS, Q.A.O. INSP.

SIGNATURE OF ITEM IDENTIFIER _____
WILLIAM FRITCH, STG. DIV. LT.

SERIAL NUMBER OF TUBE _____

DATE TUBE WAS TAKEN OUT OF BOX _____

Incld #2

WILLIAM ROSSMOORE
Counselor at Law
744 Broad Street
Newark, New Jersey 07102

(201) 622-3791

[Miss Arch, United States Attorney, District of New Jersey, Rec'd Mail Room. 1973 May 25 AM 9:07 613694—Civ. 1141-67]

May 24, 1973

Honorable John J. Kitchen
U.S. District Court
Post Office Building
Camden, New Jersey 08101

Re: U.S. v. Philip L. Bornstein, et al.
Civil Action No. 1141-67

My dear Judge Kitchen:

I am in receipt of a copy of Miss Arch's letter to you dated May 22, 1973. I was quite surprised, at this late date, after briefs had been submitted by both sides, and almost two months after the scheduled trial date to receive this attempt to add totally new facts to the case. I point out to the Court the following:

1. While Miss Arch's letter states that it is "in compliance with Stipulation No. 17(o)", it most certainly is not in such compliance. Stipulation No. 17 (o) called for proof by "affidavit or voucher". The attachments to Miss Arch's letter contain neither.

2. The attachments in no way substantiate the claim in Stipulation No. 17(o) that the "cost to the United States in replacing the 442 falsely marked 4x150G electron tubes was $40.82 per tube or a total of $18,042.44". The letter from the Chief of the Quality Assurance Office dated June 18, 1964 specifically

states, "that the tubes are to be replaced with tubes from stock". The letter from B. R. Yaros dated July 2, 1964 indicates compliance with this and the removal of only 298 tubes. The hypothetical cost break down in para. 4 of that letter is unsupported by either an affidavit or a voucher.

3. Even if the attachments to Miss Arch's letter be accepted by the Court for whatever they are worth, they show maximum damages of 298 x $40.82 or a total of $12,164.36 instead of the $18,042.44 claimed.

4. Since the Government's claim for 35 forfeitures is based on 35 invoices accompanying 8 vouchers involving the shipment of 342 radio sets containing 684 of the tubes in question, we have at this point no way of knowing how many of these 8 vouchers and 35 invoices actually contained the 150 radio sets, or 298 tubes which were removed as faulty. Accordingly there is now a total lack of proof to justify any more than one forfeiture based on the one contract involved.

5. Obviously I cannot enter into the stipulation requested by Miss Arch neither as to the cost of the 298 tubes referred to in the attachments to her letter, nor as to an additional 96 radio kit sets shipped to Lexington, Kentucky; Ft. Huachuca, Arizona; or Sacramento, Calif. If these additional radio sets, each containing 2 of the tubes in question were included, the total would rise to 492 tubes, 50 more than the highest claim the Government has made to date. The total of 492 tubes arises from the 150 sets referred to in the attachments to Miss Arch's letter and the additional 96 sets or a total of 246 sets each containing 2 tubes.

6. In any event, no further evidence should now be received which was not at hand or readily available at the last trial date of March 29, 1973 and was known of, or could have been known of, by the Government at that time. Stipulation 17(o) clearly contemplated the prompt submission of an affidavit

or vouchers in lieu of evidence which the Government attorneys would have been prepared to offer at trial at that time, not an endless search through countless government offices for new evidence. This applies equally to the attachments to Miss Arch's letter of May 22 and to the future submissions referred to therein.

Respectfully submitted,

/s/ William Rossmoore
William Rossmoore
Attorney for Defendant Gerald Page

lb

cc: Jack Ballan, Esq.
Carolyn Arch, Esq.

JACK BALLAN

Counselor at Law
14 - 25 Plaza Road
Fair Lawn, N.J. 07410

(201) 796-0719
796-4900

[Arch, United States Attorney, District of New Jersey, Rec'd Mail Room. 1973 May 29 AM 8:35, May 25, 1973. 613694—Civ. 1141-67. See 737,606]

Hon. John J. Kitchen
United States District Court
Post Office Building
Camden, New Jersey 08101

Re: U.S. v. Philip L. Bornstein, et al.
Civil Action No. 1141-67

My dear Judge Kitchen:

I have received the letter of William Rossmoore, Esq., dated May 24, 1973, which pertains to the Government's most recent submission of documents in the above. Mr. Roosmoore's letter was written following our consultation. The undersigned attorney for the defendant Philip L. Bornstein, agrees in every respect with the contents of Mr. Roosmoore's letter and herewith adopts the same with regard to the defendant Bornstein.

Respectfully yours,

/s/ Jack Ballan
JACK BALLAN

JB/do

cc: William Rossmoore, Esq.
Carolyn Arch, Esq.

June 4, 1973

The Honorable John J. Kitchen
United States District Judge
P.O. Building & Court House
Camden, N.J.

Re: U.S.A. v. Philip L. Bornstein, et al.
Civil Action No. 1141-67

Dear Judge Kitchen:

Transmitted is the Affidavit of John E. Russel, Chief, Maintenance Quality Control Division, Directorate for Quality, Sacramento Army Depot, Sacramento, California, which he states, *inter alia*, that—

(a) 96 counterfeit 4X150G [electron] tubes were found in and removed from all Radio Kit Sets on hand at said Depot which were manufactured by Model Engineering and Manufacturing Corp., Inc.; that

(b) each of the 96 counterfeit 4X150G tubes was replaced with a genuine JAN 4X150G tube received directly from the manufacturer, Eitel-McCullough; that

(c) at the time in question, the unit price for a new, unused, genuine JAN 4X150G electron tube was $40.82; and that

(d) the total cost to replace the 96 counterfeit tubes with genuine JAN tubes was $3,918.72.

Respectfully,

HERBERT J. STERN
United States Attorney

By: CAROLYN E. ARCH
Assistant U.S. Attorney

Encl.
CM/RRR No. 271144

cc: (w/encl.)
Jack Ballan, Esq. (CM/RRR No. 271145)
William Rossmoore, Esq. (CM/RRR No. 271146)

CEA:lc

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP L. BORNSTEIN, ET AL., DEFENDANTS

AFFIDAVIT

STATE OF CALIFORNIA)
) ss:
COUNTY OF SACRAMENTO)

I, JOHN E. RUSSELL, of full age, being first duly sworn, upon my oath, depose and say:

1. I am, and have been for the last 21 years, employed by the United States Army, at the Sacramento Army Depot, Sacramento, California, in employment positions involving the inspection of military electronic equipment.

2. I am presently Chief of the Maintenance Quality Control Division, Directorate for Quality, Sacramento Army Depot, Sacramento, California.

3. In June, 1964, my employment position at the Sacramento Army Depot was Chief, Quality Assurance Office, Engineering Branch.

4. In June, 1964, the Sacramento Army Depot received a teletype from the Commanding General, U.S. Army Materiel Command, Washington, D.C., referenced:

"Subject: Defective JAN Tubes" which

(a) advised that non-standard, without warranty, 4X150G tubes that had been sold by their manufacturer, Eitel McCullough (EIMAC), to Arthur H. Richardson, Inc., Chicago, Illinois (Richardson), which further sold them to Sonora Electromatics, Inc., Paterson, New Jersey

(Sonora), might possibly be included in the Radio Set Groups manufactured by Model Engineering and Manufacturing Corp., Inc., Indiana (MEMCOR), under Contract No. DA-36-039-AMC-01080(E), that had been shipped to the Sacramento Army Depot,

(b) that Sonora had added on the suspect tubes, in an orange paint which almost matched the EIMAC symbolization, the nomenclature: "JAN-CIM-4X150G", and

(c) directed that the following project be undertaken: that the Sacramento Army Depot inspect said Radio Set Groups for and locate the counterfeit tubes, remove them, freeze them, and compare their serial numbers to a list of serial numbers of the tubes known to have been sold by EIMAC to Richardson, as aforesaid.

5. On June 15, 1964, I was appointed Project Officer for this project and, in accordance therewith, proceeded to obtain and have obtained, for inspection, the location at the Sacramento Army Depot of all electronic equipment which could possibly contain the counterfeit 4X150G tube types.

6. By June 24, 1964, all electronic equipment manufactured by MEMCOR under the aforesaid Contract located at the Depot had been inspected. Ninety-six counterfeit 4X150G tubes were found in the Radio Set Groups, removed therefrom, tagged and placed under the control of the Security Officer.

7. Each of the 96 counterfeit tubes removed was replaced with a genuine JAN 4X150G tube received directly from the manufacturer, EIMAC.

8. The unit price, in June, 1964, for new, unused, genuine JAN tube type No. 4X150G, identified in the Department of Army Supply Manual, SM 11-2-4, as Federal Schedule Stock No. 5960-264-9508, was $40.82.

9. The total replacement cost for the 96 genuine JAN 4X150G tubes was $3,918.72.

/s/ John E. Russell
JOHN E. RUSSELL

Sworn and Subscribed to before me this 30th day of May, 1973.

/s/ Amelia J. Edwards
AMELIA J. EDWARDS
Notary Public

[Notary Public Stamp]

JACK BALLAN
COUNSELLOR AT LAW
14-25 Plaza Road
Fair Lawn, N. J. 07410
(201) 796-0719
796-1900

June 7, 1973

Hon. John J. Kitchen
United States District Judge
P.O. Building & Court House
Camden, New Jersey

Re: U.S.A. v. Philip L. Bornstein, et al.
Civil Action No. 1141-67

My Dear Judge Kitchen:

I object to the most unusual tactics of the Government in periodically submitting statements to the Court, long after the time to respond has passed.

The latest statement, of June 4, 1973, contained prejudicial statements of fact to which the undersigned would never have agreed, if given an opportunity to discuss the same.

I most respectfully ask the Court to ignore and reject this and the prior submission, both of which are violative of the letter and spirit of the Stipulation of Facts heretofore agreed upon, after several days of very intensive negotiations.

I wish to register the strongest objection to the unfair tactics of the Government in its use of the word "counterfeit", to describe the tubes in question. This opens up an entire new factual area and is highly improper.

Finally, if the Court does not choose to refuse to admit these documents, may I note that the latest document includes an additional and different claim of damages. Again, as pointed out in a previous response by defendants, such data renders the Government's entire case

ambiguous and makes it impossible to fix either damages or forfeitures.

Respectfully Submitted,

/s/ Jack Ballan
JACK BALLAN
Attorney for
Defendant Bornstein

JB/do

cc: U.S. Attorney
Attn: Carolyn E. Arch
Assistant U.S. Attorney
Newark, N.J.

cc: William Rossmoore, Esq.

WAC,Jr:lc

June 11, 1973

The Honorable John J. Kitchen
U.S. District Judge
P.O. Building & Court House
Camden, N.J.

RE: U.S.A. v. Philip L. Bornstein, et al.
Civil No. 1141-67

Dear Judge Kitchen:

We have received the letters of William Rossmoore, Esq. dated May 24, 1973 and June 8, 1973 and Jack Ballan, Esq. dated May 25, 1973 and June 7, 1973 in the captioned matter. These letters complain that the United States, by submitting additional proofs pursuant to paragraph 17(o) of the Stipulation of Facts, is engaging in unusual and unfair tactics and is attempting to add additional and different claims and totally new facts to the case. Nothing could be further from the truth.

The facts which are binding upon the parties in this case are set forth in the Stipulation filed on April 13, 1973. Moreover, the Government will not, and indeed, cannot claim that it suffered at the hands of the defendants, damages in excess of $18,042.44 as set forth in the complaint. Paragraph 17(o) of the Stipulation requires the United States to prove by affidavit or voucher that the *cost* in replacing the 442 falsely marked 4X150G tubes was $40.82 per tube or a total of $18,042.44. The documents tendered by the Government under letters dated May 24 and June 4, 1973 are intended to do nothing more than meet this proof. These documents are not intended to alter, change or modify any of those facts which are set forth in the Stipulation.

However, regardless of paragraph 17(o), the United States submits that the measurement of damages which it suffered by receipt of the 442 counterfeit tubes is clearly established by paragraph 17(q) to be $18,000—the amount Model paid the Government in November 1964 for submission of these tubes.

The Government has argued (Supplemental Memorandum of Law, p. 21) that this $18,000 should not be credited to the defendants, but that if it is, it should be set off from the double damages. The defendants have replied (defendants' Answering Trial Memorandum, p. 10) that this sum should be credited before damages are doubled.

We have recently discovered cases in the analogous area of anti-trust trebel damages that may shed some light on this issue, which we believe should be brought to the Court's attention: *Lysfjord* v. *Flintkote*, 135 F. Supp. 672 (S.D. Cal. 1955), *rev. on other grounds*, 246 F.2d 368, 397-98 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957); *Bal Theatre Corp.* v. *Paramount Film Distributing Corp.*, 206 F.Supp. 708, 715 (N.D. Cal. 1962); *Semke* v. *Enid Automobile Dealers Association*, 320 F. Supp. 445, 447 (W.D. Ok. 1970), *rev. on other grounds*, 456 F.2d 1361 (10th Cir. 1972).

Respectfully yours,

HERBERT J. STERN
United States Attorney

By: WILLIAM A. CARPENTER, JR.
Assistant U.S. Attorney

cc: William Rossmoore, Esq.
Jack Ballan, Esq.

CEA:lc

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 1141-67

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP L. BORNSTEIN, ET AL., DEFENDANTS

ORDER OF DISMISSAL

WHEREAS, the summons which issued in the above-entitled action to defendant, United National Labs, Division of Sonora Electromatics, Inc., a corporation of the State of New Jersey, was returned to this Court on January 10, 1968, endorsed: "not served";

WHEREAS, because said defendant has not, to date, been served with process in the above-entitled action, no jurisdiction over it has been obtained by this Court, and the matter has proceeded to judgment against the remaining defendants;

NOW, THEREFORE upon the application of the plaintiff, the United States of America, by these presents, pursuant to and in accordance with Rule 41(a)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., this Court hereby orders that the above entitled action be and the same hereby is dismissed as to defendant, United National Labs, Division of Sonora Electromatics, Inc., a corporation of the State of New Jersey, without costs.

JOHN J. KITCHEN
JOHN J. KITCHEN
United States District Judge

On the Motion of:

HERBERT J. STERN
United States Attorney
Attorney for Plaintiff,
United States of America

By: /s/ Carolyn E. Arch
CAROLYN E. ARCH
Assistant U.S. Attorney

[Original Filed Jul. 19, 1973]

SUPREME COURT OF THE UNITED STATES

No. 74-712

UNITED STATES, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ORDER ALLOWING CERTIORARI—Filed January 27, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

Mr. Justice Douglas took not part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 571710 130

Supreme Court, U. S.
FILED
JAN 6 1975
MICHAEL RODAK, JR., CLERK

NO. 74-712

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JACK BALLAN
Attorney for Respondent
Philip L. Bornstein
14-25 Plaza Road
Fair Lawn, New Jersey 07410
Admission Pending

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-712

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Philip L. Bornstein, by and through Counsel Jack Ballan, Esq., herewith files his Petition in Opposition.

JURISDICTION

Respondent Philip L. Bornstein disputes the claim of the United States of America that jurisdiction is invoked properly under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondent Philip L. Bornstein accepts the two questions as presented by Petitioner United States of America.

STATEMENT

Respondent Philip L. Bornstein generally accepts Petitioner's statement, with the following changes and additions.

Respondent made three separate shipments to the prime contractor. (Petitioner's App. A, p. 3a) Respondent had no knowledge of 35 shipments made by Model to the Government.

The United States did not suffer any significant financial loss, following the settlement from Model. (Petitioner's App. C, p. 35a)

Respondent asks the Supreme Court to affirm the Circuit Court on both questions. Clearly, there is no conflict among the Circuit Courts on the second question. With respect to the first question, the alleged different constructions of the multiple forfeiture sections of the False Claims Act simply do

not exist upon careful examination. If, as the Court below stated, the "statute ... cries out for congressional attention," this attempt to seek a writ of certiorari offers no solution to the problem.

Most significantly, it is unclear which section of the Act the United States claims was violated 35 times.

REASONS TO DENY THE WRIT

A. MULTIPLE FORFEITURES

1. The decision of the Court below is totally consistent with the leading, and uncontradicted Supreme Court determination on the question of multiple forfeitures, namely, United States ex rel. Marcus vs. Hess, 317 U.S. 537.

United States vs. Ueber, 299 F 2d 310, is not in conflict with the decision below. We must examine the facts of each case. In Ueber, the defendant actually submitted 422 invoices. These clearly come within the statutory prohibitions of false claims. In the instant appeal, the defendant did not submit more than three invoices.(Petitioner's

App. C, p. 25a) There were, indeed, 35 false markings, but these were never considered "false claims" by either of the lower Courts. There was no basis whatsoever to find additional "false claims."

Further, nowhere is it made clear under which of the three sections of the Act, the United States is proceeding. This ambiguity makes it improper to contend there is any conflict between the Court below and any other co-equal court.

The basic thrust of Ueber is consistent with the approach below, which was based on an equitable and reasonable interpretation of the False Claims Act. It is noteworthy that in Ueber the 422 invoices were reduced to 54 vouchers. If the arguments of the United States herein are valid, then Ueber should have had 422 forfeitures - an obviously unreasonable approach. As the Circuit Court below said, its view attempted a "reasonable construction" which focused "... upon conduct of the defendant

rather than upon the fortuity of the number of invoices submitted by the main contractor." (Petitioner's App. A, pp. 16a and 17a). This is perfectly consistent with the Ueber rationale and general statutory construction.

The undersigned has read almost all the cases pertaining to multiple forfeitures. For example, see Toepelman v. United States, 263 F. 2d 697 (C.A. 4) Not one - including Ueber - attached liability to the number of acts of the defendant, beyond those actually committed by him.

Nor is it correct, as the Government claims, that the decision of the court below "...substantially defeats..." the statutory objectives. As Justice Black stated in Hess, the Act's purpose was "...to make sure that the government would be made completely whole." Hess, supra, 317 U. S., at page 551; 63 S. Ct., at page 388. The court below accomplished this goal, as did the courts in both Rohleder and Ueber. In this basic respect these

decisions are, therefore, completely consistent.

B. DOUBLE DAMAGES

The courts below correctly charged only nominal double damages to defendants. The case of United States v. Klein, 230 F. Supp. 426, aff'd per curiam, 356 F 2d 983 (3d Cir. 1966), is uncontradicted by any other Circuit Court decision. The United States quotes no law contra. The Klein formula in no way "nullifies" the double-damage provision of the False Claims Act. One needs only to pose the hypothetical situation where complete restitution is not made, as it was in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JACK BALLAN
Attorney at Law of the State
of New Jersey
For defendant, Philip L.Bornstein
Admission Pending

January 3, 1975

No. 74-712

Supreme Court U. S.
APR 10 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

IRVING JAFFE,
Acting Assistant Attorney General,

KEITH A. JONES,
Assistant to the Solicitor General,

STEPHEN F. EILPERIN,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-712

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 504 F. 2d 368. The opinion of the district court (Pet. App. C) is reported at 361 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 4, 1974. On December

2, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 7, 1974. The petition was filed on December 6, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subcontractor who fraudulently causes his prime contractor to present to the United States multiple false claims for payment in connection with a government contract is liable for multiple forfeitures under the False Claims Act.

2. Whether, under the False Claims Act, single damages resulting from a subcontractor's fraud are reduced by the amount of any recoveries from the prime contractor.

STATUTE INVOLVED

The False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231, in pertinent part provides:

> Any person * * * [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *.

STATEMENT

This case arises out of a government contract for the procurement of radio kit sets for the Department of the Army.[1] The contract provided, *inter alia*, that the prime contractor, Model Engineering and Manufacturing Corp., Inc. ("Model"), would equip each of the kits with a specified type of electron tube bearing special markings to indicate that it had passed government inspection (Pet. App. C, p. 21A, n. 2).[2] Model entered into a subcontract with United Na-

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[1] The case was tried before the district court on the basis of stipulated facts, which are set forth in full at App. 38-51. The opinions of both the district court (Pet. App. C, pp. 20A-27A) and the court of appeals (Pet. App. A, pp. 1A-4A) describe these facts in detail. In the interest of ready comprehensibility and for the convenience of the Court, we are here presenting only a summary of those facts.

[2] The contract called for 4X150G electron tubes bearing the marking "JAN" (an acronym for "Joint Army Navy"), a brand designation, registered by the Patent Office, that indicates that the material has passed government inspection (Pet. App. C, p. 21A).

tional Labs ("United"), a corporation operated and managed by respondents, for the purchase of the necessary tubes.

Respondents, acting through United, purchased approximately four hundred nonconforming tubes and falsely branded them to indicate that they had been inspected by the government, whereas in fact the tubes had not been inspected (Pet. App. C, p. 24A).[3] Respondents made three separate shipments of the falsely branded tubes to Model; each shipment was accompanied by a "Certificate of Compliance" that falsely certified that the tubes conformed with the contract specifications (Pet. App. C, p. 25A). Model incorporated the tubes into radio kits and shipped the kits to the Department of the Army in 35 lots, each of which was covered by a separate claim for payment (Pet. App. C, p. 26A). The Army paid Model with eight vouchers (*ibid.*).

The Army, upon discovering that the tubes had been falsely branded, expended $16,205.54 to replace them with tubes that conformed with the contract specifications (Pet. App. C, p. 30A).[4] Model paid

[3] Respondents paid $17.50 per tube for the nonconforming tubes (Pet. App. C, p. 24A, n. 6). At the time, the market price of a government-inspected JAN 4X150G tube was $40.00 (Pet. App. C, p. 23A n. 5). Accordingly, respondents saved approximately $9,000 by supplying approximately 400 falsely branded tubes. See note 4, *infra*.

[4] The shipments from Model contained a total of 442 falsely branded tubes, which the Army replaced at a cost of $40.82 per tube. The district court found, however, that "[o]nly 397 of these tubes can be identified by serial number as having been supplied by [respondents]" (Pet. App. C, p. 25A). The cost of replacing 397 tubes was $16,205.54.

the Army $16,165.84 in settlement of a contract claim based upon that expenditure (Pet. App. C, pp. 27A, 35A).[5]

The United States then brought this suit against respondents under the False Claims Act, requesting multiple $2,000 forfeitures and double damages. The district court found that respondents, "[b]y knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, * * * caused Model to present thirty-five claims for payment to the United States" (Pet. App. C, p. 28A). The court determined that each of the 35 false claims for payment constituted a separate and complete violation of the Act and therefore that the United States was entitled to 35 forfeitures in the total amount of $70,000 (Pet. App. C, p. 38A). However, the court reasoned that Model's payment had reduced the amount of damages sustained by reason of respondents' fraudulent acts to $39.70, and therefore awarded double damages of only $79.40 (Pet. App. C, p. 35A).[6]

[5] Model paid the Army $18,000 as damages for the breach of contract; that figure represented $40.72 for each of the nonconforming tubes supplied pursuant to the contract, or a total of $16,165.84 for the 397 tubes traced to respondents (Pet. App. C, p. 35A).

[6] Respondents contended in the district court that the Army's damages should be further reduced by the fair market value of the nonconforming tubes. That contention was rejected by the court as moot once it had determined that Model's

Respondents appealed from the award of multiple forfeitures. The United States appealed from the award of only nominal double damages. The court of appeals affirmed the district court's judgment on the issue of double damages but reversed the award of multiple forfeitures.

The court of appeals acknowledged that the award was consistent with the literal language of the Act and that in like circumstances multiple forfeitures had been permitted by the Sixth Circuit in *United States* v. *Ueber*, 299 F. 2d 310 (Pet. App. A, pp. 15A-16A). The court nevertheless determined that the number of forfeitures should not be based upon the "fortuity" of the number of claims for payment actually submitted by the prime contractor. It ruled that, in cases involving fraud by subcontractors, the number of forfeitures under the Act should be determined by reference to the number of subcontracts or purchase orders whose performance was affected by the subcontractor's fraud, and not by reference to the actual number of false claims presented or caused to be presented to the United States (Pet. App. A, p. 17A). Accordingly, the court reversed as to all but one of the forfeitures.

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payment of damages was to be credited against the government's single damages (Pet. App. C, pp. 31A-32A). Respondents took no appeal from that aspect of the district court's judgment (Pet. App. A, p. 8A).

SUMMARY OF ARGUMENT

I

Both the text of the False Claims Act and its underlying policy require a subcontractor who fraudulently causes his prime contractor to present to the United States multiple false claims for payment in connection with a government contract to pay multiple forfeitures.

A. The False Claims Act imposes a $2,000 forfeiture for presenting, or causing to be presented, to the United States "any" false claim for payment. Accordingly, the statutory violation is complete upon the presentation of the first false claim, and a forfeiture arises on account of that violation; each additional false claim constitutes a separate and complete violation that gives rise to an additional forfeiture. This reasoning has long been applied in cases involving prime contractors to impose a separate forfeiture for each false claim, without regard to the number of contracts affected by the fraud. See, *e.g.*, *United States* v. *Woodbury*, 359 F. 2d 370, 377-378 (C.A. 9). The same reasoning logically extends to violations committed by subcontractors. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 540-545. When a subcontractor, by means of fraudulent misrepresentations, causes his prime contractor to present a false claim to the United States, the statutory violation is complete and the subcontractor is subject to a $2,000 forfeiture; when, as a further consequence of such misrepresentations, successive false claims are pre-

sented, each such claim represents a new violation that gives rise to an additional forfeiture. *United States* v. *Ueber*, 299 F. 2d 310 (C.A. 6).

The court of appeals below acknowledged that "[i]f literally applied the [False Claims Act] would permit a separate $2000 forfeiture * * * for each invoice submitted by the main contractor (in this case 35)" (Pet. App. A, p. 16A), but nevertheless imposed only one forfeiture because respondents' "fraud affected the performance of a single purchase order" (Pet. App. A, p. 17A). There is no basis in the statute for limiting the number of forfeitures to the number of subcontracts or purchase orders. The focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations. See *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233.

This Court's decision in *United States ex rel. Marcus* v. *Hess*, *supra*, does not support the result below. Although the effect of the ruling in *Hess* was to award one forfeiture for each subcontract or project affected by the subcontractors' fraud, that result was based upon the uncontested finding in that case that in each project there had been a single false or fraudulent claim. Here there were 35 such claims.

B. The False Claims Act was intended to further two interrelated objectives—deterrence and restitution. The holding below, limiting the number of forfeitures under the Act to the number of subcontracts or purchase orders affected by the fraud, defeats both objectives. Minimization of a civil penalty necessarily minimizes that penalty's deterrent value.

And the award of a single $2,000 forfeiture in a case such as this is unlikely to cover even the costs of investigating the false claims, let alone the costs of prosecuting the claimants.

The court of appeals was concerned that an award of multiple forfeitures would constitute a criminal rather than a civil penalty. But this Court, in *United States ex rel. Marcus* v. *Hess*, *supra*, expressly held, in a case involving the award of 56 forfeitures, that the forfeiture provision of the Act is civil, not criminal. Certainly in the circumstances here, where respondents deliberately engaged in a scheme to defraud the government for personal gain by supplying nonconforming equipment to the military, the imposition of 35 forfeitures is not an unreasonable civil sanction.

The court of appeals also believed that the number of forfeitures awarded should be based "upon conduct of the [defendant subcontractors] rather than upon the fortuity of the number of invoices submitted by the main contractor" (Pet. App. A, p. 17A). But respondents in fact committed a number of fraudulent acts, including the submission of multiple false claims, the making of multiple false entries, and the participation in a conspiracy, that, if committed by a prime contractor, would unquestionably have given rise to multiple forfeitures. There is no reason for applying a more lenient standard to subcontractors, such as respondents, than to prime contractors.

II

The courts below should not have considered the government's contract recoveries from the prime contractor in computing the single damages sustained by the United States as a consequence of respondents' fraud. The focus of the statute is on the total amount of damages caused by the fraud, not on the difference between that amount and any amounts received in compensation from third parties.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The government's normal first recourse in such cases is a claim against the prime contractor for damages for breach of contract. Where the prime contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have substantially recovered the losses occasioned by the fraud. But it is not appropriate in such cases to insulate the fraudulent subcontractor, as the courts below have done, from virtually any liability for the payment of statutory damages to the United States merely because of the government's diligence in pursuing its contract remedies.

We believe the proper result in such cases to be an assessment against the subcontractor of double the amount of the government's pre-recovery damages, followed by the equitable allowance of a credit in the amount of the government's recovery from the prime contractor.

* * * * * *

The combined effect of the errors below was to eviscerate completely the deterrent effect of the False Claims Act in cases involving subcontractor fraud. Respondents, by their fraud, achieved a direct savings in cost of approximately $9,000. The total amount of the forfeiture and damages awarded by the court of appeals was only $2,079.40. The threat of such a disproportionately small penalty is unlikely to deter any subcontractor from attempting to defraud the government: if the fraud goes undetected, the subcontractor enhances his profit and pays no penalty whatsoever; if the fraud is discovered, the subcontractor pays back the government only a small fraction of his illegal gain. The decision below thus converts the False Claims Act into little more than an inexpensive license to defraud the government—a license, moreover, that is payable only upon discovery of the fraud.

ARGUMENT

I

A SUBCONTRACTOR WHO FRAUDULENTLY CAUSES HIS PRIME CONTRACTOR TO PRESENT TO THE UNITED STATES MULTIPLE FALSE CLAIMS FOR PAYMENT IN CONNECTION WITH A GOVERNMENT CONTRACT IS LIABLE FOR MULTIPLE FORFEITURES UNDER THE FALSE CLAIMS ACT

In disallowing the multiple forfeitures awarded by the district court, the court of appeals ignored both the language and the purpose of the False Claims

Act. We will show that both the text of the Act and its underlying policy require a subcontractor who fraudulently causes his prime contractor to present multiple false claims for payment to the United States in connection with a government contract to pay multiple forfeitures.

A. The Statutory Text Prescribes A Separate $2,000 Forfeiture For Each False Claim For Payment That A Subcontractor Causes To Be Presented To The United States

The first clause of the False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231, provides that "[a]ny person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * shall forfeit and pay to the United States the sum of $2,000."[7] It is undisputed that a subcontractor violates that clause of the Act by causing his prime contractor to present a false claim to the United States. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 540-545. See also *United States*

[7] The original version of the Act contained both civil and criminal sanctions. In the Revised Statutes of 1878, the Act was divided into two separate provisions—Section 5438, which contained the criminal prohibitions, and Section 3490, which imposed civil sanctions for violations of the criminal statute. The criminal prohibitions were subsequently altered and codified in 18 U.S.C. 287 and 1001. But the civil sanctions were codified unaltered in 31 U.S.C. 231. See Pet. App. A, pp. 9A-11a.

v. *Ueber*, 299 F. 2d 310 (C.A. 6); *United States* v. *Rohleder*, 157 F. 2d 126 (C.A. 3).[8]

The Act imposes a $2,000 forfeiture for the presentation to the United States of "*any* claim * * * knowing such claim to be false" (emphasis added). Accordingly, in cases involving prime contractors, the courts have uniformly held that the Act imposes a separate forfeiture for each false claim, without regard to the number of contracts affected by the fraud. See *United States* v. *Woodbury*, 359 F. 2d 370, 377-378 (C.A. 9); *United States* v. *National Wholesalers*, 236 F. 2d 944, 950 (C.A. 9), certiorari denied, 353 U.S. 930; *United States* v. *Grannis*, 172 F. 2d 507, 515 (C.A. 4), certiorari denied, 337 U.S. 918. See, also, *Faulk* v. *United States*, 198 F. 2d 169, 171 (C.A. 5). Cf. *Toepleman* v. *United States*, 263 F. 2d 697, 698-700 (C.A. 4).[9] These decisions reflect a proper understanding of the Act: since the Act imposes a forfeiture for "any" false claim, the statutory violation is complete upon the presentation of

[8] The district court found that respondents had violated the Act by causing their prime contractor, Model, to present false claims for payment to the United States (Pet. App. C, p. 28A), and respondents did not appeal from that determination. It is, moreover, clear that each of the 35 claims for payment presented by Model was a "claim" within the meaning of the Act. See *United States* v. *McNinch*, 356 U.S. 595, 598-600.

[9] The same result has been reached under the Surplus Property Act, 40 U.S.C. 489(b). *United States* v. *Rubin*, 243 F. 2d 900 (C.A. 7); *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5). This Court has noted that that statute should be construed in harmony with the False Claims Act. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152.

the first false claim, and a forfeiture arises on account of that violation; each additional false claim constitutes a separate and complete violation that gives rise to an additional forfeiture.

This reasoning logically extends to violations committed by subcontractors. When a subcontractor, by means of fraudulent misrepresentations, causes his prime contractor to present a false claim to the United States, the statutory violation is complete and the subcontractor, accordingly, is subject to a $2,000 forfeiture; when, as a further consequence of such misrepresentations, successive false claims are presented, each such claim represents a new violation that, under the plain language of the statute, gives rise to an additional forfeiture. This reading of the Act was applied in straightforward fashion in *United States* v. *Ueber*, *supra*, 299 F. 2d at 313-314 (emphasis in original):

> *Was it error to assess a $2,000.00 forfeiture for each public voucher submitted?* The evidence disclosed that the Ueber Company [the subcontractor] submitted 422 invoices to Kaiser and Chase [the prime contractors], each of which contained false claims for direct labor. From these invoices, Kaiser prepared and submitted to the government 33 vouchers and Chase presented 21 of such vouchers. The District Judge assessed a $2,000.00 forfeiture for each of the 54 vouchers so presented to the United States. Ueber contends that only two of such forfeitures should have been imposed, one for the subcontract with Kaiser and one for the Chase subcontract. We disagree.

> The conduct proscribed by [the False Claims] Act], as applicable here, consisted of acts of causing false claims to be presented to the government. Each voucher which Ueber caused to be submitted through Kaiser and Chase was a separate act justifying an assessment of a separate forfeiture. * * * Plaintiff's complaint did not charge that the entering into subcontracts with Kaiser and Chase in any way violated [the Act]. These contracts were valid. The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act. If after remand, as hereinafter ordered, the District Judge's findings [on the question of *scienter*] are sustainable, we would find no error in the assessment of forfeitures in the total amount of $108,000.00.

The same reasoning applies here. Each of the 35 false claims for payment that respondents caused Model to present to the United States "was a separate act justifying an assessment of a separate forfeiture." This is, moreover, the only result that comports with this Court's observation, in the course of upholding 56 forfeitures in *United States ex rel. Marcus* v. *Hess*, *supra*, 317 U.S. at 552, that the False Claims Act "requires that the $2,000 forfeit be paid for doing 'any' of the [prohibited] acts * * *." See, also, *Toepleman* v. *United States*, *supra*, 263 F. 2d at 698-700. Cf. *Shea* v. *Vialpando*, 416 U.S. 251, 260.

The court of appeals below acknowledged that "[i]f literally applied the [False Claims Act] would per-

mit a separate $2000 forfeiture * * * for each invoice submitted by the main contractor (in this case 35)" (Pet. App. A, p. 16A). The court nevertheless refused to give the Act literal application in this case. Instead, the court held that "there should under the first clause of [the Act] have been a single forfeiture since the [respondents'] fraud affected the performance of a single purchase order from Model to [respondents' corporation]" (Pet. App. A, p. 17A).

There is no basis in the statute for limiting the number of forfeitures to the number of subcontracts or purchase orders affected. The Act imposes a forfeiture specifically for the presentation of a false "claim." A subcontract or a purchase order is not a "claim" within the meaning of the Act. This Court has noted, with specific reference to the False Claims Act, that " 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " *United States* v. *McNinch*, 356 U.S. 595, 599.

The false claims giving rise to the forfeitures here were the 35 invoices submitted by Model to the Department of the Army, each requesting payment on the basis of a fraudulent representation concerning a separate shipment of goods. The number of contracts between Model and the Army, or of subcontracts between respondents and Model, or of purchase orders issued by Model to respondents, is irrelevant under the Act. The focus of the Act is upon "claims," not upon contractual relations. See *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233. The critical

determinant of the number of forfeitures under the first clause of the Act is therefore not the number of contracts affected by the fraud but rather the number of false claims for payment presented to the United States. *E.g.*, *United States* v. *National Wholesalers, supra; United States* v. *Ueber, supra.* There were 35 such claims presented here, and the government accordingly is entitled to the payment of 35 forfeitures.

In deciding to the contrary, the court of appeals purported to rely upon *United States ex rel. Marcus* v. *Hess, supra*, which the court apparently read as limiting the number of forfeitures under the first clause of the Act to the number of government contracts or projects affected by the fraud. But *Hess* cannot be so read. That case involved a *qui tam* action brought by an informer against government subcontractors who had conspired to defraud the government on each of 56 projects funded by the Public Works Administration. The district court had determined that "in each project there was a single, false, or fraudulent claim made arising from the collusive-bidding plan" (41 F. Supp. 197, 216) and therefore awarded 56 forfeitures.[10] The court of appeals reversed, holding that the only claims made by

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[10] The forfeitures were awarded under the first clause of the Act, relating to the presentation of false claims. The court rejected the informer's argument that the government was entitled under the second clause of the Act to a forfeiture for each false certificate issued as a result of the conspiracy. The informer did not appeal from that determination.

the defendant subcontractors were against their prime contractor, not against the United States, and therefore that no false claims had been presented to the United States within the meaning of the Act (127 F. 2d 233, 236-237). This Court reversed in turn, holding that the Act applies to false claims submitted by a prime contractor as a consequence of its subcontractors' fraudulent representations and reinstating the award of multiple forfeitures.

Thus the effect of the Court's ruling in *Hess* was to award one forfeiture for each subcontract, or "project." But that result was based upon the uncontested finding that "in each project there was a single, false, or fraudulent claim * * *" (41 F. Supp. at 216). Nothing in *Hess* suggests that the number of forfeitures under the Act would, in other cases, be restricted to the number of separate contractual relationships.[11]

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[11] The court of appeals below may have relied upon this Court's observation in *Hess* (317 U.S. at 552) that "[t]he incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office" (see Pet. App. A, p. 15A). But that observation was not made in the context of restricting the number of forfeitures to the number of projects. To the contrary, the Court was there addressing the subcontractors' argument that since they had engaged in only one conspiracy, they were subject to only one forfeiture. The Court pointed out that the fraud affected all the projects (with regard to each of which a separate claim for payment had been made) and therefore that the subcontractors were liable for multiple forfeitures.

B. The Imposition of Multiple Forfeitures Furthers the Objectives of the Act

The False Claims Act was intended to further two interrelated purposes—deterrence and restitution. The Act "was originally adopted [during the Civil War] following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States* v. *McNinch*, *supra*, 356 U.S. at 599. The Act's sponsor in the Senate opened debate on the bill by emphasizing the need to deter and prevent the making of fraudulent claims against the government (62 Cong. Globe 952 (37th Cong., 3d Sess.)):

> The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded. From the attention I have been able to give the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing these frauds * * *.

In short, as this Court has more than once noted, "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the Government from fraudulent claims * * *' ". *United States* v. *Neifert-White Co.*, *supra*, 390 U.S. at 233.

The holding of the court of appeals below, limiting the number of forfeitures under the Act to the number of subcontracts or purchase orders affected by the fraud, would, if affirmed, substantially impair the effectiveness of the Act in deterring fraud by government subcontractors. It seems likely that, in any given case, the number of false claims for payment submitted in connection with a government contract will, as in this case, exceed the number of subcontracts affected by a subcontractor's fraud and that, therefore, the effect of the rule announced below would be to minimize the subcontractor's liability for forfeitures. Minimization of a civil penalty necessarily minimizes that penalty's deterrent value. Indeed, the decision below in essence converts the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud. That result defeats, rather than furthers, the Act's objective of "protect-[ing] the funds and property of the Government from fraudulent claims * * *." Where multiple false claims have been presented, "it would be a mockery against the intent of the statute * * * to lump all [a subcontractor's] derelictions and fraudulent practices [into a single statutory violation]." *United States* v. *Collyer Insulated Wire Co.*, 94 F. Supp. 493, 496 (D. R.I.).

A second objective of the Act is to compensate the government for the cost, delay, and inconvenience occasioned by the presentation of false claims. Indeed, this Court noted in *United States ex rel. Marcus* v. *Hess*, *supra*, 317 U.S. at 551-552, that "the chief purpose of the [Act] was to provide for restitution to the government of money taken from it by fraud, * * * that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole" and, further, that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." The Court implicitly concluded in *Hess* that Congress had resolved that "problem" by providing for multiple $2,000 forfeitures in cases, such as this one, involving multiple false claims.

The objective of affording the government restitution also is substantially defeated by the decision below. The government's contractual losses resulting from a false claim ordinarily should be adequately covered by the payment of double damages under the Act. See generally pp. 26-29, *infra*. But such an award of damages is unlikely to be sufficient to compensate the government for the additional costs it incurs in investigating false claims and prosecuting the claimants. It was for this reason, as the Court noted in *Hess*, that Congress added the forfeiture provision "to make sure that the government would be made completely whole."

Where, as here, multiple false claims are involved, a single $2,000 forfeiture is unlikely to cover even the costs of investigation. In this case, for example, once it was discovered that the radio tubes appeared to have been falsely branded, it was necessary to

trace each tube, by serial number, to one of the 35 separate invoices presented by Model and, from there, to one of the three shipping lists submitted by respondents to Model.[12] That, of course, was only the beginning of the investigatory process; once the tubes had been traced to respondents, it was necessary to establish that they were in fact falsely branded and the manner in which the false branding had been accomplished. As the Fourth Circuit noted in *Toepleman* v. *United States*, *supra*, 263 F. 2d at 699:

> • • • [N]o proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable.
>
> The Act seeks to reimburse the Government for just such losses. For a single false claim $2000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate.

The court of appeals below gave only two reasons for denying an award of multiple forfeitures, and neither of those reasons accords with either the language of the Act or its underlying policies. First, the court noted that in a case such as this literal enforcement of the Act would permit the award of forfeitures under each of the three clauses of the Act—

[12] Forty-five falsely branded tubes could not be directly traced to respondents (Pet. App. C, p. 25A).

under the first clause, for the submission of each false claim; under the second clause, for the making of each false entry; under the third clause, for conspiracy to defraud—and questioned "whether as so construed the statute would not compel the conclusion that it was penal rather than civil" (Pet. App. A, p. 16A). But this Court has already laid to rest any doubts that might once have existed concerning the civil nature of the forfeiture provisions of the Act. In *United States ex rel. Marcus* v. *Hess*, *supra*, where a total of 56 forfeitures were awarded, the Court explicitly addressed the contention that the forfeiture provisions of the Act impose a criminal penalty. The Court there observed that " '[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute" (317 U.S. at 551) and concluded that forfeiture proceedings under the Act "are remedial and impose a civil sanction" (317 U.S. at 549).

Moreover, in recognition of the broad language of the Act and its evident purposes of deterrence and restitution, "[i]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." *United States* v. *Neifert-White Co.*, *supra*, 390 U.S. at 232. Although it is true, as the court below pointed out, that the Act, if literally applied, might have permitted the award of considerably more than

35 forfeitures (because of the possibility of multiple forfeitures under the second clause of the Act),[13] that is not a sufficient reason for artificially narrowing the statutory predicate for an award of forfeitures under the first clause. It is within the discretion of the United States, in the first instance, whether to seek the maximum number of forfeitures prescribed by the literal terms of the Act. Here, the United States sought considerably less than that maximum number. Whether in the circumstances of this case it would have been unfair and an abuse of discretion to impose multiple forfeitures under both the first and second clauses of the Act is an issue that was not before the court of appeals and is not before this Court. But there was no abuse of discretion in seeking to enforce 35 forfeitures under the first clause in light of respondents' deliberate attempt to gain a dishonest profit by supplying the Army with nonconforming equipment.

The second reason given by the court of appeals for denying multiple forfeitures was that in a case involving subcontractor fraud the number of forfeitures awarded should be based "upon conduct of the defendants rather than upon the fortuity of the number of invoices submitted by the main contractor" (Pet. App. A, p. 17A). But that is a consideration of policy that should be addressed to Congress; the statute as now written clearly prescribes a forfeiture for causing "any" false claim to be presented to the

[13] The court of appeals suggested that 439 forfeitures could be imposed here under the literal terms of the second clause alone (Pet. App. A, p. 16A).

United States, and respondents caused the presentation of 35 such claims. Moreover, the contrary statutory construction adopted by the court of appeals—a construction that limits the number of forfeitures to the number of contracts affected by the fraud—fails signally to focus "upon conduct of the defendants." Respondents, for example, themselves submitted three false invoices to their prime contractor (Pet. App. A, p. 8A), made over 400 false entries in furtherance of their fraudulent scheme (see note 13, *supra*), and engaged in a conspiracy to defraud; if respondents had been prime contractors, these multiple acts would unquestionably have given rise to multiple forfeitures. The court states no reason, and we see none, for applying a more lenient standard to subcontractors than to prime contractors.

It is true that the particular measure of forfeitures applied by the government in this case—the number of false claims submitted by the prime contractor as a consequence of respondents' fraud—is not directly related to the number of respondents' own fraudulent acts. Respondents had no control over or knowledge of the number of invoices that would be submitted to the United States. However, they could reasonably have assumed that the radio kits to be supplied under the contract would be shipped in separate lots and that, accordingly, multiple claims for payment would be made. When a subcontractor acts to defraud the government, he does so at his peril and at the anticipatable risk that his prime con-

tractor will, as here, submit multiple false claims as a consequence of that fraud. Cf. *United States* v. *Ueber, supra.*

In short, the assessment of multiple forfeitures in a case such as this involves no unfair surprise, it conforms with the literal wording of the False Claims Act, and it furthers the Act's objectives of deterrence and restitution.

II

UNDER THE FALSE CLAIMS ACT, SINGLE DAMAGES RESULTING FROM A SUBCONTRACTOR'S FRAUD ARE NOT REDUCED BY THE AMOUNT OF ANY RECOVERIES FROM THE PRIME CONTRACTOR

The False Claims Act imposes not only a $2,000 forfeiture but, "in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing [the fraudulent] act * * *." The district court determined that the total amount of actual damages attributable to respondents' fraudulent acts was $16,205.54, the cost of replacing the 397 falsely branded tubes (Pet. App. C, p. 30A).[14] From that total, however, the court sub-

[14] Respondents had contended that the replacement cost should be reduced by the fair market value of the falsely branded tubes delivered to the government in order to determine actual damages; the district court disregarded that contention and respondents took no appeal on that issue. See note 6, *supra.* Accordingly, that issue is no longer present in this case. We note, however, that the rule generally applied by the courts is that when a defrauder thrusts upon the government unwanted goods that have no ready utility to it, the market value of those goods is not applied to reduce the government's damages under the Act. See, *e.g.*, *Toepleman* v. *United States, supra; Faulk* v. *United States, supra; United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J.); *United States* v. *Collyer Insulated Wire Co., supra.*

tracted the government's recovery from Model, the prime contractor, of $16,165.84 for damages for the breach of contract caused by respondents' shipments of nonconforming tubes, to arrive at the figure of only $39.70 in single damages. The district court thereupon awarded double damages of $79.40, and the court of appeals affirmed.

The recovery from Model should not have been applied in reduction of the government's single damages. The total amount of actual damages the United States sustained by reason of respondents' fraud was, as the district court acknowledged, $16,205.54. Although the recovery from Model *compensated* for the major portion of those damages, it did not *reduce* those damages within the intendment of the Act. Cf. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962). The focus of the statute is on the total amount of damages caused by the fraud, not on the difference between that amount and any amounts received in compensation from third parties. The courts below read the Act as permitting doubling only of the "amount of *uncompensated* damages which the United States may have sustained * * *." There is no basis for that reading either in the statutory text, or, as we now show, in the underlying policies of the Act.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The government's normal first recourse in such cases is a claim against the prime contractor for damages for the breach of contract caused by the subcontractor's fraud; typically, as in this case, the prime contractor will have no defense on the merits to such a suit for breach of contract. Thus, where the prime contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have substantially recovered the losses occasioned by the fraud. But it is not appropriate in such cases to insulate the subcontractor, as the courts below have done, from virtually any liability for the payment of statutory damages to the United States merely because of the government's diligence in pursuing its contract remedies against the prime contractor. "[T]he unscrupulous defendants should not be permitted to benefit from the costly and time-consuming collection efforts of the government." *United States* v. *Globe Remodeling Co.*, 196 F. Supp. 652, 657 (D. Vt.).

This is not to say that recoveries from the prime contractor should be ignored completely. We believe the appropriate result in a case such as this to be an assessment against the subcontractor of double the amount of the government's prerecovery damages, followed by the equitable allowance of a credit against the doubled damages in the amount of the

government's recovery from the prime contractor.[15] That result would achieve the statutory objective of ensuring that the United States receive double the actual contract damages resulting from the fraud. It would also preserve the deterrent effect of the double-damages provision by making the subcontractor, who presumably will be liable to the prime contractor for the amount of the latter's payment to the government, ultimately liable for the entire amount of the double damages that Congress intended the government to receive. In contrast, "if repayments were subtracted before doubling the original losses, the double damage provision would be rendered a nullity in instances where the government has fully succeeded in its efforts to secure repayments." *United States* v. *Globe Remodeling Co., supra*, 196 F. Supp. at 657.

* * * *

For the reasons stated above, the court of appeals erred on both the question of multiple forfeitures and that of double damages. But it should further be pointed out that in this case the combined effect of those errors was to eviscerate the False Claims Act as a deterrent to the commission of fraud by

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[15] The application of that rule in this case would be as follows:

single damages	$16,205.54
double damages	32,411.08
less, recovery from Model	16,165.84
respondents' liability for damages	$16,245.24

government subcontractors. Respondents deliberately engaged in a scheme to defraud the government for personal gain by supplying nonconforming equipment to the military; by doing so they achieved a direct savings in cost of approximately $9,000. See note 3, *supra*. The forfeiture and damages awarded by the court of appeals—$2,079.40—is not even great enough to deprive respondents of their ill-gotten gains.

The threat of such a disproportionately small penalty is unlikely to deter any subcontractor from attempting to defraud the government: if the fraud goes undetected, the subcontractor enhances his profit and pays no penalty; if the fraud is discovered, the subcontractor pays back to the government only a small fraction of his illegal gain. There are, of course, criminal penalties that remain as a deterrent to such fraudulent conduct. See 18 U.S.C. 287 and 1001. But Congress intended that the civil penalties of forfeiture and double damages, which could be imposed in a civil proceeding on the basis of the preponderance of the evidence, would also act as a potent deterrent to the presentation of false claims. That congressional objective was almost wholly defeated by the decision below, which converted the False Claims Act "into a minor tax upon a violation which could reap large financial benefits to the perpetrator." *United States* v. *ITT Continental Baking Co.*, No. 73-1290, decided February 19, 1975 (slip op., p. 9).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to enter a judgment for the United States of $70,000.00 in forfeitures and $16,245.24 in damages.

Respectfully submitted.

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Supreme Court, U. S.
F I L E D
JUN 9 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, PHILIP L. BORNSTEIN

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Petition For Certiorari Filed December 6, 1974
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QUESTIONS PRESENTED

I. Whether a subcontractor under the False Claims Act is responsible for multiple forfeitures arising out of unilateral and unanticipated acts of his contractor with respect to claims for payment under a government contract?

A. Whether a subcontractor under the forfeiture provisions of the False Claims Act can be held liable for incidents that occur subsequent to his own acts?

B. Whether the False Claims Act contains a policy which is intended to maximize the forfeitures assessed against the subcontractor?

II. Whether the double damage provision of the False Claims Act provides for the crediting first to the subcontractor of recovery made by the United States from the prime contractor,to be followed by the doubling feature?

STATUTE INVOLVED

Respondent Bornstein adopts herein, by reference, the argument presented to this Court by Respondent Page. To repeat would be superfluous. It should be noted only that the government failed to include in its presentation of the "Statute Involved" the entire history of the False Claims Act, 12 Stat. 696, 698, as expressed in 31 U.S.C. Sec. 231.See(Pet.Brief, p. 2); United States v. Neifert-White Co., 390 U.S. 228, 229, n.1.

STATEMENT

Respondent Bornstein, again, adopts herein by reference the arguments outlined in the Statement in the Brief of Respondent Page. The following are additional facts which have been omitted by the government or have been insufficiently explained.

It is incorrect to assert that these tubes "had not been inspected." (Pet. Brief, p. 4) Although respondents acknowledge responsibility for failure to follow "JAN" requirements, they did, in fact, submit the tubes for inspection to Saxon Laboratories, Inc., and the results affirmed "the tubes were ... operable". (App. p. 47; Stip. 17(k),(l)) There is no proof the quality of the tubes was inadequate for the uses intended.

The nature of the contract at issue is described as follows: "... Model undertook to manufacture for and supply to the Department of the Army Radio Kit Sets, each of which was to contain the following sub-items: A radio transmitter kit, a radio receiver kit, a power supply kit, a radio transformer kit, a radio receiver

kit, and a radio accessory kit. The total dollar volume of the contract and its supplements was $2,096,583.08. (Emphasis added) (Stip. 7, App., p. 39) Each accessory kit contained two of the tubes at issue herein. Therefore, respondents' contribution to the entire contract was a fraction of the total contract, both in terms of materials and costs. Indeed, respondents received a total of $12,704.00. (Pet. App. C, pp.24A 25A) This is pointed out to re-emphasize that respondents did not, and could not, cause the submission of 35 invoices by the contractor to the United States.

The government's brief erroneously states, at page 4, that "The Army ... expended $16,205.54 to replace (the) tubes..." The citation for this assertion is in error. Petitioner failed totally to provide any such proof. (Pet. App. C, p. 26A; App. p. 107, 108). All that

one might possibly assert, from the government's aforesaid "proof", with respect to replacement cost, is a figure of $3,918.72. (App., p. 109) The government's figure of a $16,205.54 loss is, therefore, pure speculation.

The history of the government's forfeiture and damage claims against respondents is an interesting study in constradictions, leading to the conclusion that the government was never clear as to its own position: The Complaint, filed January 6, 1967, states damages were $18,042.44. The acts upon which forfeitures are claimed are not detailed. (App., p. 11) Unfortunately, the government did not make the pre-trial order a part of the record. However, we see in the Stipulation of Facts, on April 13, 1973, for the first time, a claim for 38 forfeitures. Only

three of these relates to acts of respondents. (App., p. 50). And as to these three, no court has sustained the government's claims; nor has the government appealed from these unfavorable determinations. This leaves 35 forfeitures based solely on actions of the contractor and not respondents. The Circuit Court below narrates the government's position as follows:

> "In the district court the government asserted at one time 38 forfeitures: one for each of the 35 Model invoices, one for the false branding of 397 tubes, one for affixing the facsimile 'Eagle' stamp on 21 packing lists and one for the issuance of 21 false Certificates of Compliance. At an earlier time it asserted 30 for-

feitures in the mistaken belief that there were 30 invoices from United to Model rather than three. On Appeal the government is satisfied with 35 forfeitures." (Pet. App. A, p. 9A).

SUMMARY OF ARGUMENT

I

FORFEITURES

A review of the cases which have interpreted the forfeiture section of the False Claims Act has not turned up one which supports the government's rationale in this appeal. Not one case has maximized, or multiplied, the acts of the subcontractor. Not even the cases relied upon most heavily by the government support its harsh and extensive claims in this appeal. See United States v. Neifert White Co.,

390 U.S. 228 and United States v Ueber, 299 F 2d 310. The courts have given different reasons and explanations, but they have, without exception, made findings which invariably have reduced, or minimized, the acts of the subcontractor. Also see United States ex rel. Marcus v Hess, 317 U.S. 537. There are probably many reasons for this moderate approach. A few might include the following, which apply herein: there is a criminal penalty which is an adequate, and proper deterrent; the subcontractor often has only a small part of the total contract with the United States; it is inherently unjust to fix the blame on one subcontractor who is not factually responsible for the arbitrary acts of another (contractor); it is equally unjust and unfair to hold one (subcontractor) at fault for acts of another (contractor) which the former

cannot anticipate or intend.

It would appear the Circuit Court below was troubled by the gross inequity of holding the subcontractor liable for "the fortuity of the number of invoices submitted by the main contractor". (Pet. App. A, p. 17A) Deterrence should be left to the criminal statute. See 18 U.S.C. 287 and 1001. There is no historic or policy basis to the government claim that multiple civil penalties are justified to deter respondents.

II

DOUBLE DAMAGES

The government's brief does not cite one circuit court opinion which supports its attempt to obtain double damages without first giving credit for compensation received. (Pet. Brief, pp. 10, 11 and 26 to 30). The government's reliance is upon a totally

inapplicable tort concept which holds a tortfeasor should not be credited with compensation received from a collateral source. Here, the government acknowledges receipt of $18,000.00 from the contractor. (Stip. 17 (q), Pet. App. p. 47) Although this tort oriented rationale should be rejected, it still cannot fairly be argued that the contractor in this transaction was a "collateral source."

Both the district and circuit courts below found no merit in Petitioner's efforts to develop a new double damages concept, which is not founded on the cases or public policy.

The government also has changed its position with respect to the double damage claim. In the courts below, it argued there should be a total rejection of any credit for payment made by Model, the contractor. The Circuit Court described the government's position as

"disingenuous". (Pet. App. A, p. 5A) The government's present formula is stated in Petitioner's Brief, at pages 28 and 29. It now does belatedly acknowledge there should be a credit with respect to the $18,000.00 payment by the contractor to the United States.

ARGUMENT

I

UNDER THE FALSE CLAIMS ACT A SUBCONTRACTOR IS NOT RESPONSIBLE FOR MULTIPLE FORFEITURES ARISING OUT OF UNILATERAL AND UNANTICIPATED ACTS OF HIS CONTRACTOR WITH RESPECT TO CLAIMS FOR PAYMENT UNDER A GOVERNMENT CONTRACT

The government's attempt at a broad and loose construction of the civil penalties under 31 U.S.C., Sec. 231 is contrary to this Court's past holdings. See United States v. McNinch, 356 U.S. 595. This case suggests the False Claims Act should be interpreted in a manner far different from that adopted by the government in the instant matter. In McNinch, supra, at page 598, the Court stated:

> "But it must be kept in mind, as we explained in Rainwater (supra), that in determining the meaning of the words 'claim against the Government' we are actually construing

> the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions."

The major thrust of the government's argument is that its claims with respect to 35 forfeitures and a formula of double damages are necessary to compensate the United States and deter this and other respondents who would violate the False Claims Act. (Pet. Brief, at pp. 8, 11, 19, 29, 30) This conclusion arises out of a confusion between the criminal punishment of section 5438 and the civil penalties of section 3490. (Pet. App. A, p. 10A)

The purpose of the civil portion of the Claims Act is stated by Justice Black in Hess at page 331, as follows:

> "We think the chief purpose of the statutes here was to provide for restitution to the government of

> money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: 'The government ought to have the privilege of coming upon him (a fraudulent contractor) or his estate and his heirs and recovering the money of which it is defrauded.' The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."

Again, in Hess, supra, at 549, the court properly distinquished between civil and criminal penalties, as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of §5438 may 'be imprisioned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it".

A. LIABILITY FOR EACH $2,000 FORFEITURE UNDER THE FALSE CLAIMS ACT DEPENDS UPON "LOCALIZING THE INCIDENCE OF FRAUD" AND "INDIVIDUALIZED ACTS."

The government's brief states no logical difference exists between liability for forfeitures of a contractor and that of a subcontractor, under the False Claims Act. (Pet. Brief, pp. 13-15) Privity between sub-contractor and the United States is clearly not a legal issue. However, a lack of privity does make it necessary to examine carefully the acts of the subcontractor whose conduct is entirely independent of the contractor. The only case in this Court to analyze the question of multiple forfeitures supports respondents' contentions. In United States ex rel. Marcus v. Hess, supra, 317 U. S. 537, at 544 and 545,

this Court noted that the Government had contended in the trial court that a $2,000.00 forfeiture should be exacted for each and every form submitted by the defendants in the sourse of their enterprise. The trial court had limited the number of forfeitures to one for each separate project involved, the case involving false claims submitted in connection with various P.W.A. projects. The Court concluded that this decision was proper and that the "incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office. (317 U.S. at 552). At page 549, the Hess Court said: "It is, of course, well accepted that for one act, a person may be liable to pay damages and to suffer a criminal penalty. Long ago, this Court said, 'A man may be compelled to

make reparations in damages ... and be liable for a breach of the public peace, in consequence of the same act'". The reference here is to the propriety of civil sanctions following criminal penalties. But the point of the Court's argument is also that there can be no civil sanction without an act.

In this case the respondents committed three acts which involved three shipments of the tubes in question to Model. It was entirely fortuitous that Model, in turn, then submitted 35 invoices to the United States under the entire two million dollar contract. Again, payment was made by means of eight vouchers which was entirely unrelated to the acts of respondents. Respondents did not commit 35 acts. Nor is there any rational basis to argue that respondents "caused" Model to file 35 false claims. Such a position

is not supported by the Hess rationale. The number of separate projects in Hess provided a form of limitation to the number of false claims which the Court recognized, even though the defendants in Hess had submitted many more documents than there were projects.

Similarly in United States vs. Rohleder, 154 F. 2d., 130, 131 (C.A. 3d 1946) (referred to below, 361 F. Supp. at 878, 879) the Court relied on the above holding in the Hess decision to limit, not expand, the number of forfeitures. In the Rohleder case there were 16 contracts involved and the trial court had assessed the $2,000.00 forfeiture for each of the 16 contracts. The government cross-appealed claiming that each of the 90 purchase orders called for a separate forfeiture. The government tried to distinguish the Hess case on the ground that in the Hess case the fraud was

in the procurement of the contracts whereas in the Rohleder case the fraud arose from the means taken to obtain the approval of the supervisor of ship-building for each of 90 purchase orders. The Court stated that the difference exists, but is not significant because the purchase orders were part of the contracts and not definite projects in themselves. Analogizing between Rohleder and the case at bar, there was but one contract between Model and the plaintiff: the invoices submitted by Model, the vouchers paid by the government and the 3 shipments with accompanying invoices made by the defendants were all part of this one contract. Based on the Rohleder analysis, one concludes there can be but one forfeiture, not 35.

The government grounds its claims on the following argument: "The focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations." (Pet. Brief,p. 8) It's authority for this position is United States v. Neifert-White Co., 390 U.S. 228, 233. A careful reading, by the undersigned, of Neifert-White Co., reveals no such language, either express or implied. Rather the issue was the scope and meaning of the word "claim." As stated by the Court, "The question is wether the Act applies to the supplying of false information in support of an application ..." (Neifert-White Co., supra, p. 229) Respondents readily can agree with the Neifert-White Co. holding and disagree vehemently with the government's reading of the same. The latter decision does not support the implication that, somehow, a subcontractor is completely liable for the independent acts

of the contractor.

Respondent Bornstein does not limit his argument to the imposition of one forfeiture based on one contract. But he does contend that he should not be held liable for forfeitures that exceed his individual acts. Those individual acts are three in number. (App., p. 48)

B. THE CASES AND THE ACT'S POLICY AND INTENT DO NOT SUPPORT THE MAXIMIZATION AND MULTIPLICATION OF FORFEITURES ASSESSED AGAINST THE SUB-CONTRACTOR.

The heart of the government's contention with respect to a multiplication of forfeitures depends upon its analysis of United States v. Ueber, 229 F 2d 310.

In Ueber, the defendant was charged with making false claims as a sub-contractor to a prime contractor (with the United States) which held a cost-

plus-fixed-fee contract with the United States. The defendant sub-contractor, in turn, held "time and material" contracts with the prime contractor. The defendant sub-contractor presented 422 invoices to the prime contractor each of which contained false claims. Each of the 422 false invoices submitted by the defendant resulted in an increased claim being presented to the United States. In spite of this the Court affirmed the finding of the trial court limiting the forfeitures to one for each of the 54 vouchers presented to the United States by the prime contractor.

No matter what rationale is employed it is indisputable that the Ueber court reduced and did not maximize the number of claims, which was consistent with a reasonable approach to the statute

and the particular circumstances therein. As has been pointed out by all the parties herein, and the courts below, the government's interpretation of the False Claims Act could lead to the most inequitable penalties being imposed. (Pet. App. A,P.16A)

None of the cases thus far reported support the government's position herein with respect to 35 forfeitures. In seemingly every instance the number of claims made by a contractor was used to limit, rather than multiply, the number of forfeitures. Not one case has been cited which holds a subcontractor responsible for the acts of the prime contractor, which multiply the number of claims.

What follows immediately below is a discussion of several of the cases cited by the government to support its contentions.

Whenever the number of claims made by a contractor was used to determine the number of forfeitures charged against a sub-contractor, the former number was utilized only to limit the total number of forfeitures, and not to expand it. None of the cases hold a sub-contractor responsible for the acts of a prime contractor and which multiply the number of claims against the former.

In United States v. Gardner 73 F Supp. 644 (N.D. Ala. 1947) the defendants were cited for making false claims in overcharging of butane gas to certain housing projects of the Federal Housing Authority. Clearly there were a great many such shipments but the number of forfeitures was limited to one for each of the 9 quarters in which quarterly reports were issued by one of the defendants as manager of the project. One of the

defendants himself actually prepared the accounting reports which were charged as forfeitures.

In United States v. Grannis, 172 F. 2d 507 (C.A. 4th 1949), cert. denied, 337 U. S. 918 (1949) there were 130 separate shipments accompanied by vouchers with annexed schedules containing false statements as to ownership and valuation. The government argued that each of the 130 shipments should constitute a separate $2,000.00 forfeiture in addition to 10 forfeitures for each of 10 false vouchers submitted for payment by the defendants themselves (172 F. 2d at 515, 516). The court expressly denied this contention and limited the number of forfeitures to the 10 false vouchers which were actually submitted by the defendants themselves. It relied in this

decision on the Hess and Rohleder cases, supra.

In United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I. 1950) the defendants were charged with forfeitures for 105 separate false claims, each of which were submitted by the defendants themselves who were the direct contractors with the government. They were not charged with false claims based upon an arbitrary break-down of invoices or vouchers made by someone else.

Perhaps even more significant is United States vs. Toepelman 141 F. Supp. 677 (E.D.N.C. 1956). There the defendant was charged with 82 forfeitures based on 82 fraudulent notes which were submitted under only 14 letters of transmittal by the bank which was the intermediary between defendant and the Government. Thus the Court held that the

defendant was chargeable, not on the basis of acts committed by an intermediary, but on the basis of acts committed by himself, each of which resulted directly in payment to himself.

Finally, we call the Court's attention to Judge Feinberg's decision in United States v. Greenberg, 237 F. Supp. 439 443, 445 (S.D.N.Y. 1965) as exemplifying the proper approach to this case. There the Court noted that the defendant himself filed the vouchers upon which the payments were made to him. The government took the position that the number of forfeitures was within the discretion of the Court. The Court held that although there were 34 false payroll reports filed by the defendant with the United States together with 34 false affidavits, the number of forfeitures should be limited to 3, one for each of the contracts involved. There the Court

took account of the fact that the defendant had already been convicted in a criminal prosecution, as have the defendants in the case at bar. It also took account of the fact that the government had not proved any actual out-of-pocket damages.

The Court's analysis of the law on the basis of which it limited the number of forfeitures is significant: (237 F. Supp. at 442).

> "Not all false statements made to the federal government are claims within the meaning of the False Claims Act. E. g. United States v. Howell, 318 F. 2d 162 (9th Cir. 1963). In United States v. McNinch, 356 U. S. 595, 78 S. Ct. 950, 2 L . Ed 2d 1001 (1958), the Supreme Court held that the mere submission of a false application to a credit institution which, in turn, procured F.H.A. insurance of the loan did not constitute a false claim against the government. The Court stated: '(T)he conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' Id. at 599, 78 S. Ct. at 952".

So here, neither the false markings on the tubes or on the packing slips nor the false certifications constituted claims within the meaning of the False Claims Act, as the Court below properly held contrary to the government's claim. See also United States v. McNinch, 356 U. S. 595 (1958); United States v. Tieger, 234 F. 2d 589 (C.A. 3d, 1956), cert. denied, 352 U. S. 941 (1956); United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).

As the Court put it in United States v. Cochran, 235 F. 2d 131, 134 (C.A. 5th, 1956):

> "Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. The statute does not deal with or denounce fraud in general. It cannot be read as doing so".

The government here seeks to charge

defendants with a multiplicity of forfeitures based on a concept of "fraud in general". Under Cochran, it must be limited to acts of defendants themselves falsely claiming money or property.

II

UNDER THE FALSE CLAIMS ACT, DAMAGES ARE PROPERLY ASSESSED BY FIRST GIVING A CREDIT TO RESPONDENTS-SUBCONTRACTORS FOR THE RECOVERY MADE BY THE UNITED STATES FROM THE PRIME CONTRACTOR WITH RESPECT TO THE BASIC DAMAGE CLAIM

The essence of the government's case on this issue, as well as the forfeiture question, is that the double damages granted by both courts below is not sufficient to act as a deterrent. The answering arguments above apply equally here.

The case of United States v. Klein, 230 F. Supp. 426, (W.D. Pa. 1964), affirmed per curiam, 356 F. 2d 983 (3rd Cir., 1966), applies herein. The govern-

ment has chosen to ignore this significant decision in its brief. The pertinent Klein rationale reads as follows:

> "The defendant, however, contests the right of the plaintiff to receive damages with the allowance of credits due from the doubled damages. The question her is to whether credits are allowable from single damages or double damages. Certain credit amounts were received by the plaintiff after foreclosures of the properties. The Government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined."
>
> "Accordingly, the credit should be first deducted from the single damages as finally determined and the remainder doubled for the purpose of determining the amount of damages to which the plaintiff was entitled." (Underlining added)

Both courts below rejected totally Petitioner's claims of double damages. (Pet. App. C, pp. 30A-35A; Pet. App. A, pp. 5A-8A).

Again, with respect to the double damage claim, the Petitioner has altered its position from that which it took in the courts below. It seems to have discarded the concept that the $18,000.00 Model payment was made from a "collateral source".

Nevertheless, it does cite again the case of United States v. Globe Remodelling Co., 196 F. Supp. 652 (D. Vt.,1961) (decided before United States v. Klein Supra.) as supporting its contention that repayments by a third party are to be subtracted after doubling the original losses. However, in Globe the sources making the payment were truly collateral to the defendants against whom damages were sought. The defendants had aided in

procuring Federal Housing Administration insured loans to others by means of false statements. However, the actual borrowers made the payment in question. Clearly, these borrowers who actually received the money in the first place would have no claim over and against the defendants who aided them in procuring the loans by making false statements.

In the case at bar however, Model's loss, for which it repaid the government, is directly attributable to defendants and Model had a claim over and against the defendants. Clearly, Model is not a "collateral source" as were the defendants in the other case cited by plaintiff.

CONCLUSION

The judgment of the court of appeals should be affirmed and a judgment entered with respect to double damages in

the amount of $79.40, as well as a judgment with respect to the awarding of a single forfeiture in the amount of $2,000.00.

Respondent Philip L. Bornstein requests, in the alternative with respect to the question of forfeiture, that a judgment be entered not to exceed $6,000.00 which would reflect the commission by said respondent of no more than three acts herein.

Respectfully submitted.

Jack Ballan

JACK BALLAN
ATTORNEY FOR RESPONDENT
PHILIP L. BORNSTEIN

June, 1975.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 74-712

In the Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT GERALD PAGE

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QUESTIONS PRESENTED

1. Whether a subcontractor under a single contract with a prime contractor can be charged with a forfeiture under the False Claims Act for each of many invoices submitted to the United States by the prime contractor when the subcontractor played no part in determining when and how many invoices were to be submitted.

2. Respondent Page accepts petitioner's presentation of question 2.

3. If this Court finds error in the decision below with respect to question 2 there is necessarily included the question of whether respondents should be precluded from contending that damages should be reassessed to

(a) allow only those properly proven, and (b) credit respondents with the fair market value of goods delivered to the United States, when the trial court awarded only nominal damages and therefore held that respondents' contention as to credit was moot, and respondents took no appeal from the damages aspect of the judgment

STATUTE INVOLVED

Petitioner's brief purports to set forth the pertinent provisions of the False Claims Act, 12 Stat. 696, 698 as embodied in 31 USC §231. (Brief, p. 2) 31 USC §231 has never been enacted into positive law[1] and therefore

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[1] See Preface, The Code of Laws of the United States, p. 15 stating that the Code is "prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code". Table II to U.S.C.A. shows that R.S. §3490 is unrepealed. §5438 has been repealed. Rainwater v. United States, 356 U.S. 590, 591 n. 1, 592 n. 8; United States v. Neifert-White Co., 390 U.S. 228, 229 n. 1; United States v. McNinch, 356 U.S. 595, 598 n. 5; United States ex rel. Marcus v. Hess, 317 U.S. 537, 539-540. See also the legislative history in the opinion below (Pet. App. A, p9A-10A)

the official language of the Act is as set forth in RS §§3490 and 5438,[2] insofar as here pertinent, as follows:

R.S. §3490:

> "Any person. . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES', shall forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act..."

R.S. §5438:

> "Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil,

---

2 United States v. Neifert-White Co., supra.

> military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim. . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars".[3]

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3 As quoted in United States v. Neifert-

[3] Footnote continued from preceding page
White Co., 390 U.S. 228, 229 n.1, with the addition of the numbers in brackets.

STATEMENT

Respondent Page accepts the petitioner's statement of the case, with the following exceptions:

1. Petitioner does not accurately describe the record with respect to actual damages incurred.

a. Petitioner's brief misstates the status of the proof with respect to damages.

Petitioner says (p.4):

> "The Army, upon discovering that the tubes had been falsely branded, expended $16,205.44 to replace them with tubes that conformed with the contract specifications".

The record does not support this statement. The United States did claim damages of $40.82 per tube as its re-

placement costs. However, the question was left to further proof in Stipulation 17 (o), as follows (App. p. 47):

> "The cost to the United States in replacing the 442 falsely marked 4 x 150G electron tubes was $40.82 per tube or a total of $18,042.44 which is subject to proof by voucher or affidavit". (Emphasis added)

The reason for the requirement of further proof by "voucher or affidavit" is found in the Government's answer to Supplemental Interrogatory #2, the question and answer to which read as follows (Stipulation 25, App. p. 50, 59-60):

> "2. As to each tube taken from Model shipments as alleged in the answer to original interrogatory #23, state whether or not such

> tube was replaced, and if so the date of replacement, the source of the replacement, giving the name and address of the supplier thereof, and the consideration, if any, paid therefore and the name and address of the person to whom such consideration was paid".
>
> "2. Answer: None of the tubes taken from Model shipments as set forth in answer to original Interrogatory No. 23 were replaced".

This answer is reaffirmed (1) in the letter of April 19, 1971 (App. p. 52) from the United States Attorney to Jack Ballan, (Respondent Bornstein's attorney) which states that "as a matter of fact, the tubes were not replaced...", and (2) the answer of interrogatory #23 which said that the tubes were "presently in storage". (App. p. 56)

Subsequently, the Government submitted certain papers which it claimed were in compliance with Stipulation 17 (o). These were:

i. A letter dated June 18, 1964 (App. p. 91) and a "Coordination Sheet" dated July 2, 1964 (App. pp. 93-94), neither being a"voucher or affidavit". These together showed the following:

a. All tubes removed were to be identified, photographed, and recorded, and then "retained in issue stock" having previously been "frozen from issue". (App. p. 91).

b. 298 tubes "are being held in abeyance in the security area [and] [t]ubes have been obtained to replace the tubes taken from the accessory kits". (App. p. 93).

c. A "cost break-down for labor, material and inspection to remove tubes from 149 sets" gave a figure of $40.82 per tube, but gave no indication as to whether this was an actual cost of replacement (App. p. 94).

ii. An affidavit of one John Russell stated that 96 tubes were replaced at a cost of $40.82 per tube or $3,918.72; the 96 "counterfeit" tubes were "placed under the control of the Security Officer". (App. p. 109).

Respondents argued in the district court that the above did not constitute the required proof by voucher or affidavit, and objected to the timeliness of its submission. That court, however, accepted it as establishing replacement

costs. (Pet. App. C, p. 26 A, n.9). In any event the district court held the question of actual value moot because of its total treatment of the damage issue. (Pet. App. p. 32 A).

We submit that a review by this Court will confirm respondent's contention that certainly the Russell affidavit was untimely and inadequate. The Stipulation of Facts was filed April 13, 1973. (App. p. 38). Briefs on both sides were then filed and thereafter, on May 22, 1974 (App. p. 87) the documents referred to in paragraph i above were filed. Not until June 4, 1973 was the Russell affidavit filed. (App. p. 107).

In any event, even if the Russell affidavit be considered, it established

the replacement cost of only 96 of the 397 tubes involved, or only $3,918.72 out of the total alleged damages of $16,205.54. As to the balance of the tubes, petitioner never proved, or even claimed, any actual loss or damage.

b. Petitioner's brief does not take any account of the value of the tubes in fact delivered.

As the preceeding shows, at least 298 of the disputed tubes were "retained in issue stock" and another 96 were held in control of the Security Officer. The record demonstrates that these tubes were not defective in any physical way, although they were falsely branded.

The Government stated in answers to interrogatories that it did not claim

that the tubes were ". . . defective by reason of different physical, electronic, performance or similar characteristics from those required to be delivered to it under its contract with Model . . ." (Supplemental Interrogatory #1, App. p.57)

The Government's complaints were based entirely on a failure of defendants to follow the strict JAN regulations as detailed in paragraphs 12 to 16 of the Stipulation (App. pp. 41-45), Interrogatories #20 and 21 (App. pp. 54-56), and Supplemental Interrogatory #1, (App. pp. 57-58).

Secondly, a MIL/E1 electrical test was actually performed on the tubes in question and they were found operable. Stipulation 17(k)(App. p. 47).

Stipulation 17 (a) (App. p. 45) established a market price of $15.52 for the tubes actually delivered, which for the 397 tubes would total $6,161.44. The issue of whether respondents should have been credited with this amount was never reached because under its findings of only nominal damages, the district court held it to be moot. (Pet. App. C, p. 32A), For the same reason the court of appeals also did not reach this issue (Pet. App. A., p. 8A).

2. <u>The record negates any role by respondents in the determination by Model to submit its claims in 35 invoices and there is no proof that Model shipped the radio kits in 35 lots</u>.

Petitioner asserts that Model

shipped the radio sets in 35 lots (Brief p. 4). There is no proof that it shipped 35 lots or any other number of lots. The passage cited by petitioner from the district court's opinion (Pet. App. C., p. 26A) does not support petitioner's statement in this regard. It merely says:

> "Model submitted to the United States thirty-five claims for payment under the contract. These claims were designated as invoices"

Stipulation 24 on which this finding was based reads in full as follows: (App. p. 50)

> "24. Model submitted to the United States 35 claims for payment under the Contract which were designated as invoices. Each of the 35 invoices of Model included claims for payment for JAN 4 X 150 G tubes which had been 'JAN' branded by the defendants. The 35 invoices covered payment for the

> entire contract and the United States paid Model's 35 invoices with eight Government Vouchers (Exhibit G-23(a) through (h)). The defendants did not prepare any of the above-mentioned documents, or have knowledge of the manner in which the claims of Model were presented."(Emphasis added).

3. The $18,000 which petitioner says "Model paid the Army" (Brief, p. 5 n.5) was in fact withheld by the United States from payments due to Model under the prime contract.

Answer to Supplemental Interrogatory #4 states:

> "The plaintiff received the sum of $18,000 from Model Engineering in the form of a deduction from Model invoice, per voucher #121073, 13 December 1966, in accordance with Exhibits listed under Answer 3, and copy of voucher attached hereto marked Exhibit #6". (App. p. 60).

Thus payment was made and the deduction credited under this particular

voucher, #121073. This voucher (Exhibit #6 to the answers to Supplemental Interrogatories, App. p. 69) gives as the "contract number" under which payment is made "DA-36-039-AMC-01080/E" which is the very contract involved in the present action. (Stipulation 7, App. pp. 39, 84). On this same voucher under the heading "Number and date of order" there appears "15263-PP-63-Al-51 8-29-62" opposite the number "28,317.20", the amount against which the $18,000 credit is applied. The date "8-29-62" is the very date of the contract here involved and the number "15263-PP-63-Al-51" is the order number on the contract itself (ibid) and is the same order number which appears on all of

Model's other vouchers submitted for payment under the present contract. (App. p. 85).

SUMMARY OF ARGUMENT

The court below correctly held:

(1) The False Claims Act imposes a $2,000 forfeiture only for each act of the party charged with making a false claim or causing one to be made, not for the fortuitous acts of others in submitting multiple invoices; (2) When the United States has withheld payment from a prime contractor on account of fraudulently branded goods furnished by a subcontractor, the subcontractor is to be given credit for the amount of the payment thus withheld before damages are doubled; (3) Because this holding resulted in only nominal damages it did not reach the question of actual damages and proper credits for the goods received.

I.

As to the first holding, the text of the Act, as set forth in R.S.§§3490 and 5438 provides a $2,000 forfeiture to be paid by any person who shall do any of the prohibited acts, which, as here applied, are the making or causing to be made of a false claim. The Act does not prescribe forfeitures for acts committed by others than the person charged. This interpretation of the Act is consistent with the only previous case in this Court dealing with the issue. United States ex rel. Marcus v. Hess, 317 U.S. 537.

While petitioner may be correct in stating that the statutory violation is complete when a subcontractor causes

its prime contractor to present a false claim to the United States (Brief p. 7), it goes beyond the statute when it asserts that separate forfeitures may then be imposed each time the prime contractor submits an invoice, even though no further acts are committed by the sub-contractor.

In any given case, the impact of the forfeiture provision may or may not be sufficient to operate as a deterrent, but this is not the function of this provision and therefore furnishes no basis for expanding the reach of either the forfeiture or the double damages clauses. The function of deterrence is left to the criminal provisions of the Act, now appearing in 18 USC §§287 and 1001.

II.

Since the purpose of the Act is to indemnify the Government (United States ex rel. Marcus v. Hess, supra, 317 U.S. at 549) when it has withheld money attributable to the false claims, its damages only begin with the amount in excess of the amount withheld, and only this amount should be doubled. This is true even where instead of withholding, it has received payments attributable to the false claim from those in privity with the wrongdoers. United States v. Klein, 230 F. Supp. 426, 443 (W.D. Pa.) affirmed per curiam, 356 F. 2d 983 (C.A. 3).

III.

Should this Court nevertheless find

that damages should be doubled before credit is given for the amount charged to the prime contractor, this Court should not direct entry of judgment, but should remand the cause to the district court for a proper determination of the actual damages suffered and credits to be allowed.

The trial court had (1) determined the government's replacement costs for the falsely branded tubes to be $40.82 per tube as against respondents' contention that neither the replacement nor the replacement cost had been properly proven and, (2) failed to pass on respondents' claim to credit for the fair market value of the tubes delivered to and retained by the Government, correctly holding that because only nominal damages

were being awarded in any event, this claim was moot. Respondents did not appeal from the district court's decision on damages.

In fact, in view of the nominal damage award, all questions of actual damages and of allowable credits were moot and the court of appeals would have had no jurisdiction to consider an appeal by respondents from the district court's opinion on those questions. St. Pierre v. United States, 319 U.S. 41, 43, and cases there cited. But if this court should hold that damages are to be doubled before allowance for payments made by or withheld from the prime contractor, the question of the actual amount of those damages and of the credit to be allowed

for the market value of the tubes will no longer be moot. In that event, the cause should be remanded to the district court for determination of those questions under appropriate directions from this court.

ARGUMENT I

A SUBCONTRACTOR UNDER A SINGLE CONTRACT WITH A PRIME CONTRACTOR FOR THE UNITED STATES WHO PLAYED NO PART IN DETERMINING WHEN AND HOW MANY VOUCHERS WERE SUBMITTED BY THE PRIME CONTRACTOR IS NOT LIABLE FOR MORE THAN ONE FORFEITURE UNDER THE FALSE CLAIMS ACT.

A. The statutory text prescribes forfeiture only for acts of the party charged.

The False Claims Act is officially set out in R.S.§3490. It provides a forfeiture for the doing or committing of an "act" prohibited by the criminal provisions of R.S. §5438. The prohibited acts broadly stated are: (1) making or presenting or causing to be made or presented a false claim; (2) making, using or causing to be made or used, a false document, or (3) entering into an agreement, combination or conspiracy to de-

fraud the United States by obtaining the payment or allowance of a false claim.

The statute thus allows imposition of a $2,000 forfeiture upon the commission of an act by the party charged, not upon the doing of acts by someone else. But petitioner here seeks to levy a separate forfeiture for each of the 35 acts committed, not by respondents but by someone else, Model, in making claims for payment on 35 vouchers, even though it was stipulated that respondents did not prepare any of the vouchers and did not have knowledge of the manner in which the claims were presented. (App. p. 50).

Petitioner seeks this result on the argument that the text of the False Claims Act "prescribes a separate $2,000

forfeiture for each false claim ... presented to the United States." [4] (Brief, p. 12). The text, however, does not prescribe forfeitures for claims filed by others, but for acts done by the party charged. Even if it be conceded, for purposes of argument, that respondents' overall conduct "caused" the filing of 35 or any other number of false vouchers by Model, there is no showing that there was more than one act by respondents,

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[4] The court below said that §3490, "if literally applied . . . would permit a separate $2,000 forfeiture . . . for each invoice submitted by the main contractor". (Pet. App. A, p. 16A). We think this statement is not supported by the statutory language, although the conclusion reached by the court of appeals is in conformity with the statute.

the entry into the contract with Model under which falsely branded tubes were delivered,[5] which caused such filings.

Put differently, respondents' conduct or acts ended when they delivered the falsely branded tubes to Model and their role in causing Model to submit one or more false claims was over. Thereafter Model could have submitted

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[5] It might be argued that since respondents made 3 shipments of tubes under 3 invoices (Stipulation 18, App. p. 48), they committed not one, but 3 acts. However, the case was neither tried nor submitted on that theory, and the court of appeals therefore properly followed its earlier holding in United States v. Rohleder. 157 F.2d 126 (C.A. 3) (Pet. App. A. p. 17 A)

any number of vouchers from one to 199[6] or more, for the radio sets which contained falsely branded tubes received from respondents. Under the Government's theory, had Model submitted the maximum number of vouchers, respondents would have been charged with a $2,000 forfeiture for each. It is inconceivable that Congress intended such a result in what this Court has held to be a civil damage, not a penal statute. United States ex rel. Marcus v. Hess, supra 317 U.S.at549.

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[6] Each radio set contained 2 tubes (App. p. 39) and respondents are charged with 397 falsely branded tubes. (Petitioner's brief p. 4 n.4). The figure of 199 assumes all the falsely branded tubes were paired in sets.

The Hess case, the only case in this Court we have found dealing with this issue (see opinion below, Pet. App. A, p. 12A) is consistent with this position. It sustained a judgment of one forfeiture for each contract entered into by the party charged, as against a claim that forfeitures should also be charged for each false document submitted. 317 U.S. at 552. This Court referred to §3490 as requiring a $2,000 forfeiture "for doing 'any' of the acts prohibited by §5438", (ibid.) the reading of the statute which we urge here.

Other cases in this Court touching on this question, although not dealing with it directly, are consistent with this position. In Rainwater v. United

States, 356 U.S. 590, 592-593 the opinion noted that the "civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in §5438 of the Revised Statutes of 1878, and that according to familiar principles the scope of these provisions should be confined to their literal terms . . . [while giving them] 'their fair meaning in accord with the evident intent of Congress'". Imposing forfeitures only for acts committed by respondents, while at the same time using the flexible approach of the Hess case in deciding which acts to use, conforms to this view.

Petitioner cites (Brief, pp. 8,16) United States v. Neifert-White Co.,

390 U.S. 228, 233 for the proposition that the "focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations." The issue in that case was whether the Act reached "'claims' for favorable action by the Government upon applications for loans or is it confined to 'claims' for payments due and owing from the Government?" 390 U.S. at 230. The Court reversed a dismissal by the lower courts which held that it did reach "claims" for loans. The Court did not have before it any issue as to how many forfeitures were to be assessed for making such claims. There is nothing in the opinion which implies that forfeitures were to be assessed for acts other than those committed by the defendant.

While it may be true that the 35 invoices presented for payment by Model were "claims" within the meaning of the Act (Petitioner's Brief, p. 13 n. 8), the case cited by petitioner, United States v. McNinch, 356 U.S. 595, 598-600 does not support the theory that respondents are therefore liable for 35 forfeitures. The case affirmed lower court decisions holding that an application for credit insurance was not a "claim" within the meaning of the False Claims Act. 356 U.S. at 597. The Court said (id. at 598):

> "But it must be kept in mind, as we explained in Rainwater [supra], that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute.

> Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions".

The Court found it "clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government". 356 U.S. at 599. It is equally clear that not every false claim filed by someone other than the person charged is the basis for assessing a forfeiture.

In every civil False Claims Act suit there are two fundamental issues: (1) has there been a fraudulent assertion which is deemed to be a "claim" within the meaning of the Act? (2) If there has, for what act or acts is the

defendant to be charged with a $2,000 forfeiture? Petitioner's position here merges these two separate issues and asks this Court to hold that once a fraudulent "claim" is established, a defendant is chargeable with a $2,000 forfeiture without regard to how his own acts determined the number or timing of the claims. The confusion of these separate issues is contributed to by considering only 31 U.S.C. §231 as quoted on page 2 of petitioner's brief. If the official version of R.S.§3490 is read (as in the Rainwater, McNinch, Neifert-White and Hess cases, supra), the confusion disappears. For none would assert that a criminal defendant could be charged with a separate crime

for each fortuitous act of someone else in choosing to submit several separate claims to the Government rather than one.

Nor do the lower court cases cited by it support the Government's position. United States v. Rohleder, 157 F. 2d 126 (C.A. 3) (Petitioner's Brief, p. 13) was relied on by the court below (Pet. App. A. p. 14A) and directly supports its decision limiting the number of forfeitures to the number of contracts entered into by the defendant.

In United States v. National Wholesalers, 236 F. 2d 944, 950 (C.A. 9), cert. denied, 353 U.S. 930 (Petitioner's Brief, pp. 13, 17) the defendant was the prime contractor to the Government.

The Court found that each of 17 invoices submitted by it were false, but nevertheless limited the number of forfeitures to 8, the number of vouchers on which payments for false claims were prepared and made by the Government since there was no evidence that 17, rather than a lesser number of payments were contemplated by the defendant. The court said that "a loose count of false claims should not be made". The case does not support the Government's theory in the case at bar that respondents are chargeable with forfeitures for the 35 invoices submitted by Model. There was no evidence . . . that Model contemplated 35 payments when it submitted its invoices, so that no more than 8 forfeitures for the 8

vouchers actually paid (App. p. 50) could in any event be imposed, even on the Government's theory. In truth, though, the correct analogy is to the fact that there is no evidence that respondents here contemplated more than one payment when they entered into the contract with Model.

In United States v. Woodbury, 359 F. 2d 370, 377-378 (C.A. 9) (Petitioner's Brief, p. 13), a forfeiture for each of 10 false claims submitted by the defendant was sustained, as against the Government's contention that there should have been additional forfeitures based on various false papers attached to the claims. Nothing in the case charges the defendant with forfeitures for numbers of papers submitted by others.

In United States v. Grannis, 172 F. 2d 507 (C.A. 4), cert. denied, 337 U.S. 918 (Petitioner's Brief, p. 13) there were 130 separate shipments accompanied by vouchers with annexed schedules containing false statements as to ownership and valuation. The Government argued that a separate $2,000 forfeiture should be imposed for each of the 130 shipments in addition to 10 forfeitures for each of 10 false vouchers submitted for payment by the defendants themselves (172 F. 2d at 515, 516). The court expressly denied this contention and limited the number of forfeitures to the 10 false vouchers which were

actually submitted by the defendants themselves. It relied on the Hess and Rohleder cases, supra.

In Toepleman v. United States, 263 F. 2d 697 (C.A. 4), cert. denied, 359 U.S. 989 (Petitioner's Brief, p. 13) defendant was charged with forfeitures only for fraudulent notes he himself had submitted.

Faulk v. United States, 198 F. 2d 169, 171 (C.A. 5) (Petitioner's Brief, p. 13) involved only 5 forfeitures and no issue concerning the number was raised.

In United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I.) (Petitioner's brief, p. 20) the defendants were charged with forfeitures for 105 separate false claims, each of

which were submitted by the defendants themselves who were the direct contractors with the government. They were not charged with false claims based upon an arbitrary break-down of invoices or vouchers made by someone else. Since the case deals only with a prime contractor, the passage quoted on p. 20 of Petitioner's Brief inserting the word "subcontractor" in brackets gives an erroneous impression.

The only case which in theory supports the Government position here is United States v. Ueber, 299 F. 2d 310 (C.A. 6). Interestingly, however, while, if technically viewed, that case did assess forfeitures against a subcontractor based upon the number of

vouchers presented by the prime contractor to the United States, the actual effect was to limit, rather than expand, the number of forfeitures assessed. The prime contractor held cost-plus-fixed-fee contracts with the United States. The subcontractor in turn held "time and material" contracts with the prime contractor and presented 422 false invoices each of which resulted in an increased claim presented to the Government because of the effect of the subsidiary time and material subcontract on the cost-plus-fixed-fee prime contract. Nevertheless, the forfeitures were limited to one for each of 54 vouchers presented to the United States

by the prime contractor. Certainly, the spirit of the Ueber case does not justify imposing 35 forfeitures on respondents for their single contract and 3 shipments with accompanying invoices.

More apt is the opinion in United States v. Cochran, 235 F. 2d 131, 134 (C.A. 5) that:

> "Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. The statute does not deal with or denounce fraud in general. It cannot be read as doing so".

The Government here seeks to charge defendants with a multiplicity of forfeitures based on a concept of "fraud in general". Forfeitures should be im-

posed only with respect to acts of defendants themselves falsely claiming money or property or resulting in such false claims.

B. The objectives of the Act do not require charging a defendant with forfeitures for acts of others.

Petitioner states correctly that the originalpurpose of the statute adopted during the Civil War included both restitution and deterrence (Brief, p. 19). It forgets, however, that the statute in separate, but cross-referenced sections, later embodied in R.S. §§3490 and 5438, accomplished the restitution function by the civil provisions of §3490 and the deterrent function by the

criminal provisions of §5438.[7] The scope of the civil remedy cannot be expanded by an appeal to the need for deterrence which is the function of the criminal provisions.

The point was well taken by this Court in the Hess case, supra, 317 U.S. at 549, as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of §5438 may 'be imprisoned at hard labor for not less than one or more than five

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[7] Now enacted into positive law in 18 U.S. C. §§287, 1001. See opinion below, Pet. App. A, p. 10A. Respondents here had been convicted on guilty pleas to a violation of 18 U.S.C. §1001. App. pp. 18-19, 47.

> years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it".

The function of the civil remedies of forfeitures and double damages as devices to obtain restitution for the United States was recognized in Rex Trailer Co. vs. United States, 350 U.S. 148, 151-153 (cited Petitioner's Brief, p. 13, n. 9) in analogyzing the provisions of the Surplus Property Act, 40 U.S.C. §489, to those of the False Claims Act.

If Congress deems that frauds against the United States are not sufficiently deterred by existing law, the remedy is to increase the criminal penalties by statute, not to expand the civil liability of defendants by judicial interpretation.

II

BOTH OF THE LOWER COURTS CORRECTLY CREDITED RESPONDENTS WITH THE AMOUNT PAID BY THE PRIME CONTRACTOR BEFORE DOUBLING DAMAGES.

Although Petitioner argued below (see Pet. App. A., p. 5A) that no part of the $18,000 settlement paid by Model on account of the claim asserted in this case should be credited to respondents, it now asserts only that this payment should be credited after damages are first doubled. (Brief, pp. 28-29). No case dealing with payments on account of the false claims is cited. In fact, the only case prior to the one at bar dealing with this question supports the decisions below.

In United States v. Klein, 230 F. Supp. 426, 443 (W.D. Pa.), affirmed per curiam, 356 F. 2d 983 (C.A. 3) the court

dealt with this question as follows:

> "The defendant, however, contests the right of the plaintiff to receive damages with the allowance of credits due from the doubled damages. The question here is to whether credits are allowable from single damages or double damages. Certain credit amounts were received by the plaintiff after foreclosures of the properties. The government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined .
>
> "Accordingly, the credit should be first deducted from the single damages as finally determined and the remainder doubled for the purpose of determining the amount of damages to which the plaintiff was entitled".

The Klein decision finds support in the Rohleder and Hess decisions, supra. As the court in Rohleder noted, 157 F. 2d at 129, the trial court in Hess, 41 F. Supp. 197, 205 (W.D. Pa.) (affirmed at 317 U.S. 537, 553) had found, in allowing the $2,000 forfeitures, that there were certain "instances where the United States withheld payments on account of the discovery of the fraud, so that no actual damage was shown". Significantly, in the instant case, the payment by Model was effectuated in the form of a deduction from money still owed Model under the same contract. (App. pp. 60-69, see point 3 under the Statement above).

Just as in the Hess case, there were therefore no damages to double.

Petitioner hints that there is some basis for applying the collateral source rule by citing (Brief, p. 27) Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962). This article points out that the collateral source rule does not apply to sums received from the wrongdoer in reparation or from joint tortfeasors. 46 Minn. L. Rev. at 671 n. 4.

Respondents, of course, were in privity with Model and were liable to it for any sums it paid the United States on account of respondents'

wrongdoing. The case which first used the term "collateral" in reference to this rule (id. at 671 n.7) was Harding v. Town of Townshend, 43 Vt. 536, 538 (1871). In that personal injury accident case, credit was denied the defendant for money received by plaintiff from his accident insurance company, the court stating:

> "The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procurred solely by the plaintiff and at his

expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit". (Emphasis added)

The rule does not apply here where there was privity between Model and respondents. See also Harper and James, The Law of Torts 1343-1344.(1956)

Viewed in the light of the limited applicability of the collateral source rule, petitioner's reference (Brief,

pp. 28-29) to United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt., 1961) will be seen as inapposite. In that case the sources making the payment were truly collateral to the defendants against whom damages were sought. The defendants had aided in procuring Federal Housing Administration insured loans to others by means of false statements. However, the actual borrowers made the payment in question. Clearly, these borrowers who actually received the money in the first place would have no claim over against the defendants who aided them in procuring the loans by making false statements. In the case at bar, however, Model's

loss, for which it repaid the Government, is directly attributable to defendants and Model had a claim over against the defendants.

We have already dealt in the preceding point with the argument (Petitioner's Brief, p. 20) respecting the deterrent effects of allowing credit only after damages have been doubled. As this Court said in the passage already quoted from Hess:

> "We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it". 317 U S. at 549.

The mechanism by which the doubling

is accomplished should not be expanded in order also to increase the deterring punishment which has been properly left to the criminal provisions.

There is no relevancy to the citation in petitioner's brief (p.30) to United States v. ITT Continental Baking Co., No. 73-1290, decided February 19, 1975 (slip op., p.9). That case in no way concerned the issue of damages, but rather statutes (15 U.S.C. §§ 21 [1] and 45 [1]) which imposed "a civil penalty" for violations of orders of the Federal Trade Commission. Id. at p. 5, n. 5 and 6.

To restate this point another way, let us suppose that (1) the conduct

for which respondents were charged was that proscribed by the third clause of R.S. §5438, a conspiracy to defraud the United States by obtaining payment of a false claim, but (2) that Model discovered the false branding of the tubes and never delivered them to the Government. In such event, respondents might have been liable for a $2,000 forfeiture, butthere would have been no damages to double. Similarly, if only part of the total number of false tubes had been delivered. So, too, when as here, Model delivered all the falsely branded tubes, but then allowed the Government full credit therefore, the Government has suffered no damages

to be doubled.

III

SHOULD THIS COURT HOLD THAT THE COURTS BELOW ERRED IN THE MANNER OF ASSESSING DOUBLE DAMAGES, THE CASE SHOULD BE REMANDED FOR COMPUTATION OF DAMAGES ACTUALLY SUFFERED WITH INSTRUCTIONS TO ALLOW RESPONDENTS CREDIT, BEFORE DOUBLING, FOR THE FAIR MARKET VALUE OF THE GOODS DELIVERED.

Petitioner's position with respect to the issue here argued is presented solely in footnotes to its brief. In note 6 (Brief, p. 5) it referred to respondents' contention in the district court that "damages should be further reduced by the fair market value of the nonconforming tubes. That contention," it said, "was rejected by the court as moot once it had determined that Model's payment of damages was to be credited against the Government's

single damages". Then it noted that "respondents took no appeal from that aspect of the district court's judgment." Petitioner makes the same point at note 14, page 26 where it also argues on the merits that credit should not anyhow have been given for the market value of the goods.

It is submitted that petitioner errs both (1) in its innuendo that the issue is foreclosed by the failure to appeal from an issue rendered moot by "the award of only nominal double damages" (Petitioner's Brief, p. 6) and (2) its argument on the merits. (3) Furthermore, as we showed above in the Statement, there was no proper

proof of the damages to the Government occasioned by replacement of the tubes.

A. Respondents are not precluded from pressing their contentions as to damages by the failure to appeal from the judgment of only nominal damages.

As to (1), a "federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it". St. Pierre v. United States, 319 U.S. 41, 43; United States v Alaska Steamship Co., 253 U.S. 113, 115-116; United States v Hamburg-Amerikanische Co., 239 U.S. 463, 475; Nelson v United States, 443 F. 2d 75 (C.A. 5); Greenspun v State of Nevada, 430 F. 2d 1327 (C.A. 9), cert, denied, 400 U.S. 1009;

Blackburn v U.S. Parole Board, 429 F. 2d 364 (C.A. 5); Armendariz v Hershey 413 F. 2d 1006, 1008 (C.A. 5). It being undisputed that the damages awarded were nominal and that the issue of the actual amount was therefore moot, there was nothing for respondents to appeal.

B. Even if the doubling formula sustained below was erroneous, correct computation of damages proven will not give the result petitioner seeks.

1. The failure of proof of replacement costs will result in no damages.

As shown, at most the Government has proven, albeit belatedly, only replacement of 96 tubes for $3,918.72. Doubling of this amount and

then crediting Model's payment of $16,165.84 will still give zero damages. If this Court agrees, an affirmance is required, or at most a remand to redetermine damages actually incurred.

2. In any event, respondents should be credited with the market value of the tubes sold to the Government prior to doubling damages.

The cases cited in Petitioners Brief (pp. 26-27 n.14) in fact support respondents' position that they should becredited with the market value of the tubes sold prior to any doubling.

In United States v. Collyer Insulated Wire Co. 94 F. Supp. 493, 498 (D.R.I. 1950) the court noted that all of the wire shipped to the Government, while it did not meet the specifica-

tions, had value at least to the defendants and none was ever returned nor was there any offer of return made by the plaintiff. It further added that "it is not at all clear from the evidence, that all the wire and cable were worthless even to the Government". Based on this, the court declined to award damages at all. The reasoning is equally applicable here. The Government never offered to return the tubes to the defendants. They had at the time in question a market price of $15.52 per tube (App., p. 45). The tubes in fact underwent a MIL-E-1 electrical test, which is the production test part of the JAN procedure

(App., p. 43) and were found operable. (App., p. 47). Indeed, petitioner does not claim that the falsely labeled tubes shipped to it had any physical defects. This is made clear from its answers to interrogatories set forth above in the Statement.

United States v. Ben Grunstein & Sons Company, 137 F. Supp. 197, 205 (D.N.J. 1955) held that the proper measure of damages under the False Claims Act is "the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received".

The rule of the Ben Grunstein case

is also stated in United States vs. Woodbury, supra, 359 F. 2d at 379 as follows:

> "Ordinarily the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful".

United States vs. Foster Wheeler Corp., 447 F. 2d 100, 102 (C.A. 2) refers to the Woodbury and Ben Grunstein cases for the correct measure of damages and also to United States v. American Packaging Corp., 125 F. Supp. 788, 791 (D.N. J. 1954). In the latter case the court noted the measure of damages as "the difference between the value of what the government

was entitled to receive under the contracts and the value of what it actually received". See also United States v. American Precision Products Corp., 115 F. Supp. 823, 828 (D.N.J. 1953)

In Toepleman v United States, supra, 263 F. 2d at 700, credit for the market price of the goods was allowed before doubling, the only issue there being the date on which the market price should be determined.

If this Court should find error in the rulings below on the doubling of damages, a recomputation on the basis of $40.82 per tube would result in the following:

Damages for 397 tubes at $40.82	$16,205.54
Less credit for market value at $15.52. .	6,161.44
Net damages.	10,044.10
Doubled.	20,088.20
Less credit for settlement with Model	16,165.84
Net amount due . . .	3,922.36

In this event, the case should be remanded with instructions either (1) to enter damages as shown, or (2) alternatively, to fix the damages by crediting defendants with the fair market value of the goods, as determined by the trial court, before doubling, and then crediting with the payment from Model.

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, should this Court reverse on the issue of damages, the case should be remanded to the district court with instructions to enter a judgment for the United States only after determining its actual damage and giving proper credit for the fair market value of the tubes delivered.

Respectfully submitted,

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